

**DOCKET**

No. 87-1965-CFX  
Status: GRANTED

Title: Marcus C. Zinnermon, et al., Petitioners  
v.  
Darrell E. Burch

Docketed:  
June 1, 1988

Court: United States Court of Appeals  
for the Eleventh Circuit

Counsel for petitioner: Hubener, Louis F.

Counsel for respondent: Powers, Richard M.

Entry	Date	Note	Proceedings and Orders
1	Jun 1 1988	G	Petition for writ of certiorari filed.
2	Jun 1 1988		Appendix of petitioner Marcus Zinnermon, et al. filed.
4	Jun 20 1988		Order extending time to file response to petition until August 5, 1988.
5	Aug 5 1988		Brief of respondent Darrell Burch in opposition filed.
6	Aug 5 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Aug 10 1988		DISTRIBUTED. September 26, 1988
8	Aug 19 1988	X	Reply brief of petitioner Marcus Zinnermon, et al. filed.
9	Feb 27 1989		REDISTRIBUTED. March 3, 1989
10	Mar 6 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Mar 6 1989		Petition GRANTED. *****
12	Mar 16 1989	G	Motion of petitioners to dispense with printing the joint appendix filed.
13	Apr 3 1989		Motion of petitioners to dispense with printing the joint appendix GRANTED.
15	Apr 12 1989		Order extending time to file brief of petitioner on the merits until May 6, 1989.
16	May 1 1989		Record filed.
		*	Certified copy of original record and proceedings, 2 volumes, received.
17	May 4 1989		Brief of petitioners Marcus Zinnermon, et al. filed.
19	May 19 1989		Order extending time to file brief of respondent on the merits until June 26, 1989.
30	Jun 23 1989	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
20	Jun 26 1989	G	Motion of American Orthopsychiatric Association, et al. for leave to file a brief as amici curiae filed.
22	Jun 26 1989		Brief of respondent Darrell Burch filed.
24	Jun 29 1989		LODGING by respondent. Box containing copy of trial transcript.
25	Jul 20 1989		SET FOR ARGUMENT WEDNESDAY, OCTOBER 11, 1989. (2ND CASE)
28	Jul 26 1989	X	Reply brief of petitioners Marcus Zinnermon, et al. filed.
27	Jul 27 1989		CIRCULATED.
29	Aug 30 1989		Motion of American Orthopsychiatric Association, et al. for leave to file a brief as amici curiae GRANTED.
31	Oct 10 1989		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
32	Oct 11 1989		ARGUED.



**PETITION  
FOR WRIT OF  
CERTIORARI**

87-1965 ①

Supreme Court, U.S.

FILED

JUN 1 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

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MARCUS C. ZINERMON, M.D., et al.,

Petitioners,

v.

DARRELL BURCH,

Respondent.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the alleged "willful, wanton and reckless" detention of a mentally disturbed person for purposes of treatment without a hearing states a claim for denial of procedural due process under 42 U.S.C. §1983, where the due process deprivation was random, unforeseeable and contrary to state law, and where state law provides adequate post-deprivation remedies.

**PARTIES TO THE PROCEEDINGS BELOW**

The following is a list of all parties appearing in the proceedings before the United States Court of Appeals for the Eleventh Circuit who are petitioners or respondents before this Court:

**Petitioners**

Marlus C. Zinnermon, M.D.  
Robert B. Williams  
Janet V. Potter  
Marjorie R. Parker  
James J. Sweet  
Mary Sue McCormick  
Kishorchandra Pandya, M.D.  
Peter K. Chou, M.D.  
Grover Harrison  
Elouise Daniel  
Martha C. Stephens

All of the above individuals were employees of the Florida State Hospital.

**Respondent**

Darrell Burch



## TABLE OF CONTENTS

	<u>PAGE</u>
Question Presented	i
Parties to the Proceedings Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	13
Conclusion	43
Certificate of Service	45

# TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>Addington v. Texas</u> , 441 U.S. 418 430 (1979)	37, 39
<u>Burch v. Apalachee Community Health Services, Inc.</u> , 840 F.2d 797, 799 (11th Cir. 1988)	5, 9, 31
<u>Collins v. King</u> , 743 F.2d 248 (5th Cir. 1985)	27
<u>Daniels v. Williams</u> , 474 U.S. 327, 322 (1986)	35, 41
<u>Haygood v. Younger</u> , 769 F.2d 1350 (9th Cir. 1985) <u>cert.</u> <u>denied</u> U.S. 106 S.Ct. 3333 (1986)	29, 31, 32
<u>Holloway v. Walker</u> , 784 F.2d 1287 (5th Cir. 1986)	26
<u>Hudson v. Palmer</u> , 469 U.S. 517 (1984)	passim
<u>Logan v. Zimmerman Brush Company</u> , 455 U.S. 422 (1982)	20, 21, 25, 27, 30
<u>Lynch v. Household Finance Corp.</u> , 405 U.S. 538 (1972)	9
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 344 (1976)	42
<u>Parham v. J.R.</u> , 442 U.S. 584, 615 (1979)	41, 42

<u>Parratt v. Taylor</u> , 451 U.S. 527 (1981)	passim
<u>Patterson v. Coughlin</u> , 761 F.2d 886 (2d Cir. 1985) <u>cert.</u> <u>denied</u> , 474 U.S. 1100 (1986)	30, 31, 32
<u>Paul v. Davis</u> , 424 U.S. 693, 701 (1976)	35
<u>Toney-El v. Franzin</u> , 777 F.2d 1285 (7th Cir. 1985)	26
<u>Vinson v. Campbell County Fiscal Court</u> , 820 F.2d 194, 199 (6th Cir. 1987)	24, 25
<u>Wadhams v. Proconier</u> , 772 F.2d 75 (4th Cir. 1985)	26
<u>Whitley v. Albers</u> , 475 U.S. 312, 327 (1986)	41
<u>Wright v. Newsome</u> , 795 F.2d 964 (11th Cir. 1986)	30, 31
<u>Yates v. Jamison</u> , 782 F.2d 1182 (4th Cir. 1986)	25
<u>OTHERS</u>	
Rule (12)b, Federal Rules of Civil Procedure	8
Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983	13
Section 394.459(3), Florida Statutes (1981)	6, 34, 40

Section 394.459(13), Florida Statutes (1981)	7
Section 394.465, Florida Statutes (1981)	39
Section 394.465(2) & (3), Florida Statutes (1981)	40
Section 394.467, Florida Statutes (1981)	39
Section 394.467(2), Florida Statutes (1981)	34
Section 768.28, Florida Statutes (1981)	7
Section 768.28(1), Florida Statutes (1981)	7
Supreme Court Rule 20	3
28 U.S.C. §1254(1)	3
28 U.S.C. §2101(c)	3



NO. \_\_\_\_\_

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1987

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**MARLUS C. ZINERMON, M.D., et al.,**

**Petitioners,**

**vs.**

**DARRELL BURCH,**

**Respondent.**

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

\_\_\_\_\_  
**Petitioners, Marlus C. Zinermon, M.D.,  
Robert B. Williams, Janet V. Potter,  
Marjorie R. Parker, James J. Sweet, Mary  
Sue McCormick, Kishorchandra Pandya, M.D.,  
Peter K. Chou, M.D., Grover Harrison,  
Elouise Daniel, and Martha C. Stephens,  
employees of the Florida State Hospital,  
petition this Court for a writ of**

certiorari, to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

#### OPINIONS BELOW

The March 18, 1988, en banc decision of the United States Court of Appeals for the Eleventh Circuit reversing the district court is reported at 840 F.2d 797. (App. 1) The order granting rehearing en banc and vacating the panel opinion is reported at 812 F.2d 1339. (App. 98) The panel decision of the court of appeals affirming the district court is reported at 804 F.2d 1549. (App. 100)

The opinion and judgment of the United States District Court for the Northern District of Florida is not reported. (App. 134)

#### JURISDICTION

The en banc decision of the court of appeals was entered on March 18, 1988. This petition has been filed and docketed within the period established by Supreme Court Rule 20 and 28 U.S.C. §2101(c).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are:

United States Constitution,  
Amendment XIV.

Section 1 of the Civil Rights Act of  
1871, 42 U.S.C. §1983.

Section 394.459, Florida Statutes  
(1981).

Section 394.463, Florida Statutes  
(1981).

Section 394.465, Florida Statutes  
(1981).

Section 394.467, Florida Statutes  
(1981).

Section 768.28, Florida Statutes  
(1981).

The pertinent text of the foregoing constitutional provisions and statutes is reproduced in the appendix.

#### STATEMENT OF THE CASE

From the allegations of the complaint and the documents attached to it and incorporated by reference, the en banc decision gleaned the following facts.

On December 7, 1981, a concerned citizen found plaintiff Darrell Burch wandering along a highway and took him to the Apalachee Community Mental Health Services, Inc. ("ACMHS"), in Tallahassee, Florida, a facility designated by the state as capable of receiving patients suffering from mental illnesses. The en banc decision of the Eleventh Circuit states that:

Upon his arrival, Burch was hallucinating, confused, disoriented, and clearly psychotic, was wearing no shoes, and believed that he was in heaven. At the request of

ACMHS, Burch signed a form for voluntary admission and a form for authorization for treatment.

Burch v. Apalachee Community Health Services, Inc., 840 F.2d 797, 799 (11th Cir. 1988)(en banc).

Burch remained at ACMHS for three days. ACMHS diagnosed his condition as paranoid schizophrenia and administered psychotropic drugs. Because ACMHS could not provide the treatment Burch needed, he was transferred to Florida State Hospital ("FSH") on December 10, 1981. Id. at 799.

While at ACMHS, Burch signed a form requesting voluntary admission to FSH and another authorizing treatment at FSH. On arrival at FSH, Burch signed another form for voluntary admission and on December 23, 1981, another form for authorization of treatment. Records attached to the complaint indicate that Burch was in a psychotic state at the times he signed these



forms. FSH kept Burch as a patient until May 7, 1982. During this time, Burch was not accorded a hearing at which to challenge his detention and treatment. Id.

The complaint (Count III) alleges that Burch was incapable of "voluntary, knowing, understanding and informed consent to admission and treatment at FSH." (App. 201) It further alleges that Burch was confined against his will and subjected to involuntary treatment, and that the petitioners (defendants below and employees of FSH) "acted with willful, wanton and reckless disregard of and indifference to Plaintiff's constitutionally guaranteed right to due process of law." (App. 202)

Florida law provides that a mental patient shall be asked to give express and informed consent to treatment if he is competent. Section 394.459(3), Florida Statutes (1981) (App. 145) The statute

further provides that if a patient refuses to consent or revokes consent he shall be discharged within three days, or, if the patient meets the criteria for involuntary placement, proceedings for involuntary placement shall be instituted within three days. Id. No involuntary placement proceedings were provided for Burch.

Florida law waives sovereign immunity for the tortious actions of the state and its agencies. Section 768.28, Florida Statutes (1981) (App. 185) Under this statute, suit may be filed against any agency "for injury . . . caused by the negligent or wrongful act or omission of any employee of the agency . . . while acting within the scope of his office or employment under circumstances in which . . . a private person, would be liable to the claimant." Section 768.28(1), Florida Statutes (1981). Section 394.459(13),



Florida Statutes (1981), also provides a cause of action for damages against "[a]ny person who violates or abuses any rights or privileges of patients provided by this act . . . ." (App. 149)

The district court granted motions to dismiss the complaint pursuant to Rule 12(b), Fed.R.Civ.P., relying primarily on Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 469 U.S. 517 (1984).<sup>1</sup> It reasoned that the failure of the staff of FSH to follow the involuntary placement

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<sup>1</sup>Parratt held that the negligent loss of a prisoner's hobby kit by prison officials who had failed to follow established procedures for handling mail did not state a claim for relief under 42 U.S.C. §1983 when adequate state procedures existed whereby the prisoner could be compensated. Hudson held that even the intentional deprivation of a prisoner's property by a random, unauthorized act likewise stated no claim if a meaningful post-deprivation remedy were available to the prisoner.

procedures prescribed by Florida law made it "impracticable, if indeed not impossible, to provide [other] adequate pre-deprivation process to the plaintiff." (App. 139) Furthermore, the district court found that Florida's statutory procedures regarding voluntary and involuntary placement were adequate to insure due process of law and further that Florida law provided adequate post-deprivation due process in the form of an action for damages. (App. 139)

A panel of the court of appeals affirmed the district court decision. Burch v. Apalachee Community Mental Health Services, Inc., et al., 804 F.2d 1549 (11th Cir. 1986). The opinion found the logic of Parratt and Palmer controlling and held on the basis of Lynch v. Household Finance Corp., 405 U.S. 538 (1972), that the alleged deprivation of procedural due process should be analyzed in an identical fashion

regardless of whether the deprivation affected liberty or property. The panel opinion observed that:

Burch has not alleged that Florida statutory procedures were constitutionally inadequate; nor has he made a colorable claim that the governing boards of ACMHS or FSH had a policy, custom or regular practice of not following the mandated procedure.

804 F.2d at 1553. The panel concluded that the State could not predict that FSH employees would ignore state law and thus, as in Parratt and Hudson, it could not "establish any type of predeprivation hearing, beyond that provided by the statutory commitment procedures, to protect Burch from random and unauthorized acts." Id. at 1556. Finding Florida's post-deprivation tort remedies adequate, the panel affirmed that plaintiff had stated no claim for relief under 42 U.S.C. §1983.

The court of appeals then granted rehearing en banc, vacating the panel decision. 812 F.2d 1339. Eight judges of the court concurred in a decision reversing the district court and five judges dissented. 840 F.2d 797. In addition, of the eight member majority, five concurred in an opinion stating that Burch had actually raised a claim for a substantive due process violation and should be permitted to amend his pleadings accordingly. 840 F.2d at 803.

The majority reasoned that Parratt and its progeny applied only where the random and unauthorized conduct was that of a state actor who lacked authority to deprive persons of constitutionally protected interests. Because the FSH employees had authority to deprive Burch of his liberty, they -- and therefore the State -- were in a position to provide for predeprivation due process. 840 F.2d at 802, n. 10.

Hence, because "predeprivation procedures were practicable . . . postdeprivation remedies cannot provide due process." 840 F.2d at 801. The predeprivation hearing was practicable "because the appellees had both the ability to predict that one was required and the duty because of their state-clothed authority to provide one." 840 F.2d at 802. The court of appeals also concluded that the "state officials" at FSH had "abused their state-clothed power," thus distinguishing Burch's claim from other section 1983 cases "seeking recovery based upon mere torts of state officials." 840 F.2d at 803, n. 12.

#### REASONS FOR GRANTING THE WRIT

- I. The Eleventh Circuit Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This Court has not decided whether an alleged "willful, wanton and reckless" deprivation of liberty states a claim for relief under 42 U.S.C. §1983 when the deprivation was random, unpredictable, and contrary to state law, and when the state provides adequate post-deprivation remedies. The en banc decision of the Eleventh Circuit decides that a claim for relief exists in such circumstances and that the adequacy of state post-deprivation remedies is not even a relevant consideration. Its reasoning is squarely at odds with this Court's decisions concerning the negligent or intentional deprivation of property interests. If a distinction between



intentional deprivations of property and liberty interests is to be observed under section 1983, the basis for it should be articulated by this Court.<sup>2</sup>

The dichotomy which the Eleventh Circuit seems to have drawn between liberty and property interests has no basis in the decisions of this Court. In essence, the court of appeals determined that if state law authorizes -- indeed, requires -- that certain predeprivation due process be provided, it is practicable in all instances to provide it. A state may not even contend that it was impossible to anticipate the random, unauthorized conduct of its agents and therefore not possible to pro-

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<sup>2</sup> In Lynch v. Household Finance Corp., 403 U.S. 538, 552, the Court stated that "[t]he dichotomy between personal liberties and property rights is a false one."

vide predeprivation due process. This reasoning is directly contrary to the decisions of this Court in cases involving deprivation of property interests.

Examination of Parratt v. Taylor, 451 U.S. 527 (1981), and its progeny underscores the illogic of the decision below. In Parratt, as here, the state officials failed to follow prescribed policies and procedures for the handling of mail. The prisoner's loss was not a result of some established state procedure, but rather the unauthorized failure of the state's agents to follow established state procedure. Id. at 543. Moreover, this Court observed:

There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for that State to provide a predeprivation hearing.

Id. Because state law provided the prisoner a means for compensation, he could not



claim that he was deprived of property without due process.<sup>3</sup>

Burch's loss of liberty resulted from a failure to follow prescribed state procedure - as in Parratt - as well as from, it must be said, his admitted psychotic condition and conspicuous need for treatment.<sup>4</sup> As in Parratt, Burch has not alleged that the involuntary placement procedures mandated by Florida law are constitutionally inadequate or that it was practicable for the state to provide a predeprivation hear-

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<sup>3</sup>Parratt was overruled in Daniels v. Williams, 447 U.S. 327, 330-331 (1986), but only "to the extent that it states mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment."

<sup>4</sup>Burch has never contended that he was not psychotic or that the diagnosis of paranoid schizophrenia was inappropriate or that he was not in need of treatment.

ing when those procedures were not followed. Nor does he contend that Florida's tort remedies would provide him inadequate redress.

In Hudson v. Palmer, 468 U.S. 517 (1984), this Court held that the reasoning of Parratt applied to intentional deprivations of property. The Court said:

The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.

468 U.S. at 533. Because the state afforded adequate post-deprivation remedies, the intentional deprivation of property by a state employee did not violate the due process clause of the Fourteenth Amendment.

Hudson expressly rejects the argument that because an agent of the state who intends to deprive a person of his property can provide predeprivation process, then as a matter of due process he must do so. Id. at 534. The Court held that "[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." Id. (Emphasis supplied.) The majority opinion below adopts precisely the argument rejected in Hudson. It holds, tautologically, that if a person is clothed with authority to deprive another of his liberty, then he must provide predeprivation process because he can provide it, being clothed with the

authority and duty to do so. But the sole inquiry according to Hudson is whether the State is in a position relative to its errant agent to provide predeprivation due process when the agent does not. Clearly, as the district court and panel decision found, Florida was in no such position. (App. 139, 127) Florida has done all it can do to assure a mentally ill person of due process. It cannot provide such a person another layer of due process protection because it cannot know when an unauthorized deprivation will occur.<sup>5</sup>

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<sup>5</sup>As the panel opinion noted, it has not been alleged that the deprivation in this case was the result of an established state procedure bent upon ignoring the requirements for involuntary placement. 804 F.2d at 1553. (App. 110, 127) The dissent to the en banc decision makes the same point, noting that only two of thirteen judges read the complaint as stating a deprivation pursuant to established state procedures. 840 F.2d at 811, n. 2. (App. 62, 63)



As a further justification, Judge Clark's concurring opinion below would hold that the instant case is controlled not by Parratt and Hudson, but by Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982). In Logan, an Illinois state commission failed to hear an employment discrimination claim within the 120 day period allowed by state law. The Illinois Supreme Court, in affirming the commission's dismissal of the claim, held the time period jurisdictional and the claim terminated, rejecting the claimant's contention that the law so interpreted denied him due process. This Court, in holding that the Illinois law denied the claimant due process, determined that Parratt did not support the Illinois decision, concerned as Parratt was with random and unauthorized acts of state employees. 455 U.S. at 435, 436. In con-

trast to Parratt, the Illinois state system itself destroyed a complainant's property interest "by operation of law, whenever the Commission fail[ed] to convene a timely conference . . . ." Id. (Emphasis supplied.)

Judge Clark's concurring opinion suggests that Logan controls because "[a]s in Logan, the failure of Florida officials to arrange for a hearing was a deprivation of an 'established state procedure'." 840 F.2d at 806. This badly misstates the sense of Logan. The challenge in Logan was "not [to] the Commission's error, but the 'established state procedure' that destroys Logan's entitlement." 455 U.S. at 436. The established state procedure was the time limitation that arbitrarily terminated the claim by operation of law if the Illinois state commission failed to act. In the instant case, it was not the estab-

lished state procedures that deprived Burch of his liberty but the random and unauthorized failure of state agents to heed those procedures. Burch was not deprived of anything by the operation of Florida law. This being so, and Florida's post-deprivation remedies providing adequate process, Burch has no claim under section 1983 according to this Court's analysis in Hudson and Parratt.

The decision of the court of appeals therefore underscores the pressing need for this Court to settle two questions of great importance under the Fourteenth Amendment and section 1983. The first is whether the intentional deprivation of a liberty interest should be analyzed in the same manner as for a property interest for purposes of determining a claim under section 1983. The second question is whether the failure to observe state procedures prescribed by

law can ever be random and unauthorized, or whether the very establishment of such procedures means that any failure to follow them is itself the operation of state law, hence predictable not random, and hence always within the power of the state to control.

II. The Decisions Of The Federal Courts Of Appeals Are In Conflict And Reflect Uncertainty And Confusion In The Analysis Of Intentional Liberty Deprivations And Deprivations Caused By State Employees Acting In Contravention Of State Law.

The courts of appeals are sharply divided over the question of whether a claim for relief can be stated under section 1983 when state officials deprive a person of a constitutional right by disregarding or acting in contravention of state laws intended to protect that right. It appears that at least four circuits -- the Fourth,

Fifth, Sixth, and Seventh -- have held that such action would not state a claim for relief if adequate state remedies exist, while at least three others -- the Second, Ninth, and Eleventh -- have held that such action would state a claim. The conflict is in urgent need of resolution by the Supreme Court.

Cases refusing to recognize a claim under section 1983 reason that the state could not predict that its established procedure would not be followed and therefore it "was in no position to provide predeprivation process" when the state official's act was "random and unauthorized." There is no deprivation of due process because state action is not necessarily complete until the termination of the state's post-deprivation remedy. See Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 199 (6th Cir. 1987) (county juve-

nile probation officer obtained a summons directed to mother of truant children without filing the necessary petition, and the mother contended she was unlawfully deprived of liberty when jailed pursuant to the invalid summons). Vinson relies on Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986), where a city failed to give the owner of an unfit dwelling the notice and hearing required by state law prior to demolition of the dwelling. Although the plaintiff alleged the defendant city was "willfully and recklessly negligent" in failing to comply with the notice and hearing procedures, the court of appeals ultimately held that the plaintiff was not challenging the operation of state procedures but the failure to follow them. Therefore, the logic of Parratt and Hudson, not Logan, controlled.



To like effect is Wadhams v. Procnier, 772 F.2d 75 (4th Cir. 1985), a case in which Virginia officials mistakenly failed to credit an inmate's sentence with seven days spent in jail in Florida awaiting pick up, although Virginia law provided for such credit. The court of appeals held that the inmate had no claim for the wrong "even though the actors be state officials acting pursuant to their official duties." Id. at 77. The Seventh Circuit reached the same result in Toney-El v. Franzin, 777 F.2d 1285 (7th Cir. 1985), wherein a prisoner was incarcerated 306 days beyond his release date because of a mistake of correction officers.

In Holloway v. Walker, 784 F.2d 1287 (5th Cir. 1986), plaintiffs in a federal court 1983 action alleged a conspiracy by a Texas state court judge with an adverse party in state litigation to deprive plain-

tiffs of their property. The Fifth Circuit held Logan not controlling because in Logan it was possible for the state to remedy the defective procedure to prevent the challenged deprivation. It was not possible, however, for the State of Texas to prevent a biased or corrupt judge from depriving a litigant of property in the first instance. Id. at 1291-1292. Hence, no claim could be stated under section 1983 because the opportunity to appeal from judgment was an adequate post-deprivation remedy. Accord Collins v. King, 743 F.2d 248 (5th Cir. 1985) (plaintiff inmate had no claim under section 1983 based on allegations that his infraction of prison rules was judged by a biased tribunal that included one official who joined the tribunal speci-

fically to punish the inmate for an earlier, unrelated event).<sup>6</sup>

Under these cases, no matter whether the deprivation is of property or liberty, and no matter whether it is alleged to be negligent, intentional, willful or reckless, plaintiff Burch would have no claim for relief under section 1983 as long as Florida's post-deprivation remedies provided him adequate redress. That is because Burch has not attacked Florida's

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<sup>6</sup>Collins further held that under section 1983 a plaintiff must plead either that the state has established a procedure that is itself constitutionally deficient or that it has provided no adequate remedy for aberrational departures by its servants from proper procedures. 743 F.2d at 354. See also Campbell v. Shearer, 732 F.2d 531 (6th Cir. 1984), requiring that a plaintiff must plead and prove that available state remedies are inadequate or systematically defective in order to state or prove a proper procedural due process claim under section 1983 for deprivation of property.

established procedures and because the State of Florida was in no position to prevent the hospital employees' random and unauthorized disregard for the law, whether that disregard stemmed from a mistaken interpretation or intentional non-compliance.

In almost direct contravention of these decisions is Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985), cert. denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 3333 (1986), wherein a former inmate brought a section 1983 suit against state officials after the California Supreme Court ruled that the inmate had been confined five years beyond his correct release date. The Ninth Circuit, in upholding a claim for relief under section 1983, acknowledged that the defendant officials had erroneously interpreted the law but held that the injury was the product of operation of state law, not random or unauthorized "but wholly predictable, author-



ized and within the power of the state to control." Id. at 1357. Logan, not Parratt and Hudson, was the controlling case. The Second Circuit reached a similar result in Patterson v. Coughlin, 761 F.2d 886 (2nd Cir. 1985), cert. denied, 474 U.S. 1100 (1986), wherein prison officials failed to accord an inmate a hearing sufficient under state rules before placing him in isolation and taking away "good time." The court found the injury "foreseeable" and hence the deprivation of liberty neither random nor unauthorized.

Finally, in a case almost directly contrary to Hudson v. Palmer, the Eleventh Circuit recognized a claim under section 1983 based on correctional officers' intentional destruction of an inmate's legal papers, a law book and some personal photographs. Wright v. Newsome, 795 F.2d 964 (11th Cir. 1986). Based on the allegation

that confiscations had occurred before at the prison, the court of appeals inferred that such actions were standard, established procedures. This point aside, however, the court also held that the particular act at issue, the intentional destruction, did "not involve a situation in which predeprivation due process would not have been feasible." Id. at 967. Wright seems to have lighted the way for the instant Burch ruling holding that the state may be liable for errant acts that are not alleged to be established procedures simply because state officials are in a position to, but do not, follow the law.

Burch, Haygood and Patterson also strongly imply that any intentional denial of a liberty interest is automatically actionable under section 1983. Burch suggests that any misuse of state power possessed by virtue of state law would form

the basis of a claim under section 1983. 840 F.2d at 802,803. Haygood would hold that an injury is the product of the operation of state law, hence actionable, even where the state law is ignored or misinterpreted. In such circumstances, no act can ever be random or unauthorized because it is within the power of the state to control, even if that control is only theoretical. 769 F.2d at 1357. Patterson reasons similarly: if predeprivation due process is not impossible, any failure to provide it is actionable under section 1983. 761 F.2d at 892. None, therefore, finds any need to consider the adequacy of post-deprivation state remedies.

The analytical framework of these decisions is categorically different from that employed by this Court in Hudson v. Palmer. There it was recognized that a state cannot anticipate and control in

advance the random and unauthorized intentional conduct of its employees. 468 U.S. at 533. Three circuits, nevertheless, apparently hold that the deviation of state employees from prescribed state procedures cannot, by definition, be random and unauthorized. At least four circuits hold the determinative inquiry to be that pronounced in Hudson, i.e., whether the state is in a position to provide predeprivation process when state employees do not and whether their wrongful act is sanctioned by established procedures.

The State of Florida does not contend that the allegations of the complaint -- that Burch was confined and treated for his psychosis against his will -- are to be treated lightly. But what is of utmost importance at this point is to determine the analysis appropriate to an allegedly intentional liberty interest deprivation --



one neither prescribed by the state nor sanctioned by its practices. It seems facile at best to hold, as did the en banc opinion, that the actors in Parratt and Hudson lacked authority to deprive a person of his property or liberty without due process but that Florida State Hospital employees had such authority. Clearly they did not; in the absence of valid consent, they only had authority to bring Burch before a court, which, for whatever reasons, they failed to do. See sections 394.459(3) and 394.467(2), Florida Statutes. (App. 145, 170) They lacked authority to hold Burch against his will, just as the state actors in Parratt and Hudson lacked authority to act as they did.

It is equally disingenuous to suggest as a matter of law that state employees' disregard for established state law and procedures -- whether negligent or willful

-- can never be random or unauthorized simply because state law demands adherence to such procedures. By this reasoning an act unauthorized by established state law and procedures is, paradoxically, "authorized" merely because an actor possesses some form of state authority. Such a decision threatens to make the Fourteenth Amendment that "font of tort law" against which this Court has repeatedly warned. See Paul v. Davis, 424 U.S. 693, 701 (1976), and Daniels v. Williams, 474 U.S. 327, 332 (1986). The analysis applied by the court of appeals below to an allegedly intentional deprivation of a liberty interest cannot be reconciled with the decisions of this Court on intentional deprivations of property interests. This Court must decide what Fourteenth Amendment and section 1983 jurisprudence will henceforth require.

III. When The Need For A Hearing Is Inherently Uncertain, The Due Process Inquiry Should Focus On The Adequacy Of State Post-Deprivation Remedies.

Construing the allegations of the complaint in favor of Burch, it may be concluded that defendants erred in accepting him as a voluntary patient and in treating him when he was not competent to give his consent. The fact that this allegation must be taken as true - that Burch was not competent to consent - reinforces the contention that the appropriate focus is upon the adequacy of post-deprivation remedies.

If a section 1983 claim may be based on allegations of invalid consent to treatment, the obvious and untoward consequence of the decision below could well be to eliminate all treatment of consenting mental patients without a prior judicial hearing whenever their thinking appears in any way impaired. It is probable that most

mental patients will appear in some way impaired. Yet, a person who is schizophrenic may know when he needs treatment. Conversely, a person who appears in many ways normal can be profoundly disturbed, perhaps to the extent that, with hindsight, his consent to treatment arguably can be vitiated. It is scarcely likely that even trained personnel will correctly judge the competency of every voluntary mental patient. This determination, and hence the need for a hearing, are inherently uncertain. As this Court recognized in Addington v. Texas, 441 U.S. 418, 430 (1979), "[t]he subtleties and nuances of psychiatric diagnosis render certainties beyond reach in most situations."

It is all too easy for one whose mental faculties were not entirely healthy at the time of hospital admission to later allege that his consent was void because he was

not fully competent to give it and was thus deprived of a due process hearing and confined against his will. Few, if any, physicians and psychologists will care for a mentally disturbed patient who voluntarily agrees to treatment if the patient may later claim in a lawsuit that his consent was not competently given. States may have to provide adversary judicial hearings, including lawyers and psychiatrists, before allowing any mental patient to be admitted to a state facility for treatment. The costs of such proceedings will be significant.<sup>7</sup> Moreover, if

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<sup>7</sup>A state has a legitimate interest in how it allocates its limited resources. As stated in Parham v. J.R., 442 U.S. 584, 605 (1979): "The state also has a genuine interest in allocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming procedural minuetts before the admission."

all admissions must be considered involuntary, fewer disturbed people will be able to find treatment if the rigorous criteria for involuntary commitment must be met. See section 394.467, Florida Statutes (App. 169), and Addington v. Texas, supra. The statutory procedure by which a voluntary patient may sign himself in and out of the system could become a dead letter. See section 394.465, Florida Statutes. (App. 163)

Because the validity of any mental patient's consent is inherently uncertain, it is imperative that the due process inquiry focus on the adequacy of state post-deprivation remedies, as in Parratt and Hudson, rather than on the mere lack of an initial hearing. Florida's damage remedies in tort and its statutory cause of action for abuse of a patient's rights have been discussed. Ante, p. 7, 8. (App. 185,



149) Florida also provides procedures whereby a voluntary mental patient can obtain discharge and the law requires that he and his guardian or representative receive written notice of such procedures "[a]t the time of his admission and each 6 months thereafter," Section 394.465(2) and (3), Florida Statutes. (App. 164, 166) A voluntary patient is entitled to discharge within three days of his written or oral request unless involuntary placement proceedings are begun. Sections 394.459(3)(a) and 394.465(2), Florida Statutes. (App. 145, 164)

Burch does not even attempt to allege that Florida's established procedures and remedies provided him inadequate due process or that there has been a pattern of disregard for those laws. He believes it sufficient to allege that a hearing was not held in "willful, wanton and reckless"

disregard of his rights. Although the en banc majority opinion of the court of appeals apparently sustains his view by ignoring the existence of Florida's remedies and procedures, this Court has clearly left open the question of whether the catch phrase "willful, wanton and reckless" can, without more, state a claim for relief under section 1983. Daniels v. Williams, 474 U.S. 327, 334, n. 3; Whitley v. Albers, 475 U.S. 312, 327 (1986).

Although the handling of Burch's hospital admission may reflect obvious error, this Court has recognized in a case involving commitment of mentally disturbed children that "it bears repeating that 'procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.'" Parham v. J.R., 442 U.S. 584, 615 (1979), quoting



from Mathews v. Eldridge, 424 U.S. 319, 344 (1976). It is highly unlikely that the generality of cases questioning voluntary admissions will be as clear cut as that of Burch appears to be. The process due a patient accepted as voluntary and not provided a hearing must be shaped in view of the patient's uncertain mental state. That process should not unduly burden a state's efforts to deal with difficult social problems. Parham, supra. 442 U.S. at 608, n. 16.

We therefore submit that Florida's procedures for treatment of its mentally ill and the damage remedies provided by law strike a proper constitutional balance between the liberty interests of individuals and the legitimate interests of the state. If Florida's post-deprivation remedies are adequate, the federal courts should not be burdened with cases contest-

ing medical judgments rather than constitutional rights. Accordingly, it is suggested that a substantial question has been submitted to this Court for determination under the Fourteenth Amendment to the United States Constitution.

#### CONCLUSION

When considered in light of this Court's decisions in Parratt v. Taylor and Hudson v. Palmer, the decision of the Eleventh Circuit Court of Appeals is wrong. The sharp division among the judges of the Eleventh Circuit, together with the disparate decisions of other circuits in comparable cases, signal the need for guidance from this Court. The complaint reflects no attack upon the established procedures of the State of Florida but only an isolated, random and unauthorized failure to take a legal step needed to obtain ap-

proval for the treatment of an individual whose need is admitted, not questioned. No facts are alleged that warrant an analysis beyond that previously accorded the intentional or negligent deprivation of property. In light of the significance of this issue, and the pronounced conflict among the circuit courts of appeals, we respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

Richard M. Powers, P.A.  
850 Barnett Bank Building  
315 South Calhoun Street  
Tallahassee, FL 32301

LOUIS F. HUBENER

# APPENDIX

87-1965

NO. \_\_\_\_\_

Supreme Court, U.S.

FILED

JUN 1 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

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MARCUS C. ZINERMON, M.D., et al.,

Petitioners,

v.

DARRELL BURCH,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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PETITIONERS' APPENDIX

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215 PM



TABLE OF CONTENTS

	<u>PAGE NO.</u>
<u>Burch v. ACMHS, Inc.,</u> 840 F.2d 797(11th Cir. 1988) ( <u>en banc</u> )	1
<u>Burch v. ACMHS, Inc.,</u> 812 F.2d 1339 (11th Cir. 1987)	98
<u>Burch v. ACMHS, Inc.,</u> 804 F.2d 1549 (11th Cir. 1986)	100
<u>Burch v. ACMHS, Inc.,</u> unreported U.S. District Court decision, Sept. 26, 1985	134
<u>United States Constitution</u> Amendment XIV	141
42 U.S.C. § 1983	142
Florida Statutes (1981)	
Section 394.459	143
Section 394.463	151
Section 394.465	163
Section 394.467	169
Section 768.28	185

TABLE OF CONTENTS

(continued)

PAGE NO.

Complaint filed in U.S. District  
Court by Darrell Burch on  
February 8, 1985

190

Motion to Dismiss filed in U.S.  
District Court by Defendants  
on March 29, 1985

204

Darrell Burch, Plaintiff-Appellant,

v.

Apalachee Community Mental Health  
Services, Inc., et al.,  
Defendants-Appellees.

No. 85-3843

United States Court of Appeals,  
Eleventh Circuit

Appeal from the United States  
District Court for the Northern  
District of Florida

March 18, 1988

Before RONEY, Chief Judge, TJOFLAT,  
HILL, PAY, VANCE, KRAVITCH, JOHNSON,  
HATCHETT, ANDERSON, CLARK, and EDMONDSON,  
Circuit Judges, and TUTTLE and GODBOLD,  
Senior Circuit Judges.\*

JOHNSON, Circuit Judge:

In this action brought under 42

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\* Senior U.S. Judges Elbert P. Tuttle and John C. Godbold have elected to participate in further proceedings in this matter pursuant to 28 U.S.C.A. § 46(c).



U.S.C.A. s. 1983, Darrell Burch alleges that appellees' "willful[ly], wanton[ly] and [with] reckless disregard" deprived him of his liberty without due process of law. The United States District Court for the Northern District of Florida granted the appellees' motion to dismiss the action for failure to state a claim upon which relief could be granted. See Fed.R.Civ.P. 12(b)(6). We reverse the district court, holding that Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and its progeny do not apply to Burch's allegations. Although we hold that Burch has stated a claim upon which relief could be granted and that he has a right to attempt to prove he is entitled to relief, we express no view on the merits of Burch's claim, i.e., whether he is entitled to compensatory damages.

I.

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), we take the material allegations of the complaint and its incorporated exhibits as true, Walker Process Equip. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174-75, 86 S.Ct. 347, 348-49, 15 L.Ed.2d 247 (1965), and liberally construe the complaint in favor of the plaintiff. See Fed.R.Civ.P. 8(f); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). This standard of review mandates that we reverse the dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46, 78 S.Ct. at 102.

When the complaint is liberally construed and the material allegations are taken as true, Burch's complaint and incor-

porated exhibits reveal the following facts:

On December 7, 1981, a concerned citizen found Darrell Burch wandering on the side of a highway and took him to the Apalachee Community Mental Health Services, Inc. (ACMHS), a facility designated by the state as capable of receiving patients suffering from mental illnesses. Upon his arrival, Burch was hallucinating, confused, disoriented, and clearly psychotic, was wearing no shoes, and believed that he was in heaven. At the request of ACMHS, Burch signed a form for voluntary admission and a form for authorization for treatment.<sup>1</sup>

Burch continued to appear psychotic during his three-day stay in ACMHS's PATH

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<sup>1</sup> Burch attached to his complaint, and incorporated therein by reference, all the forms, documents, and correspondence mentioned in this opinion.

Program. ACMHS diagnosed Burch as having paranoid schizophrenia and began to give him psychotropic drugs. ACMHS could not provide Burch with the treatment he needed and therefore transferred him to Florida State Hospital (FSH) in Chattahoochee, Florida, on December 10, 1981. Before transferring Burch, ACMHS had Burch sign forms requesting voluntary admission to FSH, along with a form authorizing treatment at FSH.<sup>2</sup> ACMHS records indicate Burch was still psychotic on December 10.

Although Burch remained in a psychotic state, FSH had him sign a form for voluntary admission upon his arrival at the facility. Burch continued to believe he

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<sup>2</sup> On December 8, 1981, notes of a ACMHS staff member indicated, "If he (Burch) does not begin to clear will consider FSH on 12/10. I think he will sign voluntary [sic]."

was in heaven. On December 23, 1981, FSH had Burch sign another authorization for treatment form. FSH kept Burch as a patient until May 7, 1982, allegedly against his will. Throughout his 152 days in ACMHS and FSH, Burch never was accorded a hearing at which to challenge his commitment and treatment.

Based upon the above facts and after his release from FSH, Burch brought the circumstances of his confinement to the attention of the Florida Human Rights Advocacy Committee. Burch's complaint to the Committee alleged that he had been inappropriately admitted to FSH and did not remember signing a voluntary admission form. Linda Weeks, apparently an Advocacy Committee member, researched hospital records and found Burch's signature on the voluntary admission form signed upon his arrival at FSH. Weeks, however, also found docu-

mentation that Burch was heavily medicated and disoriented on admission and concluded that Burch was "probably not competent to be signing legal documents."<sup>3</sup>

On August 4, 1983, the Advocacy Committee discussed the matter at its Florida State Hospital meeting. At that point, as set forth in a letter responding to Burch's complaint to the Advocacy Committee, the "hospital administration was made aware that they were very likely asking medicated clients to make decisions at a time when they were not mentally competent."<sup>4</sup>

Burch subsequently sought relief under Section 1983, and sued ACMHS and the FSH

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<sup>3</sup> Exhibit G to Burch's Complaint in the present case.

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<sup>4</sup> Id. Burch also presented a claim to the Advocacy Committee that he had been physically abused while at FSH.



employees who were connected with his admission or treatment.<sup>5</sup> Burch alleged that those defendants had confined and treated him against his will, without any judicial determination of his need for treatment as required by Florida law and the United States Constitution. He further alleged that the defendants "willful[ly]], wanton[ly] and [with] reckless disregard" deprived him of his liberty without due process of law, and that he was substantially damaged when against his will he was committed and treated with mind-altering drugs.

All of the appellees sought dismissal of Burch's complaint for failure to state a

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<sup>5</sup> Burch's complaint also sought recovery from the county sheriff who transported him from ACMHS to FSH. The sheriff, apparently having been dropped from the litigation, is not a party to the appeal.

claim upon which relief could be granted. The district court granted their motions, holding that under Parratt<sup>6</sup> and its progeny, Florida's postdeprivation procedures satisfied the requirements of due process and precluded a Section 1983 action.

## II.

In a Section 1983 action, the plaintiff must show that the conduct complained of (1) was committed by a person acting under color of state law and (2) deprived him of rights, privileges, or immunities secured by the Constitution or laws of the United

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<sup>6</sup> In Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Supreme Court partially overruled Parratt, concluding that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property." Id. at 663 (emphasis in original). Daniels does not govern the present case because Burch has not alleged that the appellees' negligence deprived him of his liberty.

States.<sup>7</sup> In the present case, Burch seeks relief based upon the Due Process Clause of the Fourteenth Amendment, which provides that "[n]o State . . . shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." The Due Process Clause is the source of three types of Section 1983 claims: (1) violations of incorporated provisions of the Bill of Rights; (2) violations of its substantive component; and (3) violations of its proce-

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<sup>7</sup> Section 1983 provides in relevant part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to be deprived of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

dural component. We conclude that Burch states a claim upon which relief could be granted for a procedural due process violation.

[11] Our analysis focuses on whether (1) Burch seeks recovery based on a constitutionally cognizable liberty interest, (2) Burch received the process he was due, (3) Burch suffered from a constitutionally cognizable deprivation of liberty, and (4) Burch suffered the injury as a result of state action. We begin by holding that Burch's claim implicates a liberty interest protected by the Due Process Clause. The concept of liberty certainly protects the right of an individual to avoid the physical confinement of long-term mental hospitalization against his will. See Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 1808-09, 60 L.Ed.2d 323 (1979).

### A. Due Process

We next determine whether Burch received the process he was due. The Supreme Court has stressed that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Id. In addition, the Court has recognized that "it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual." Id. at 425-26, 99 S.Ct. at 1809.

The Court has also recognized that the state has some countervailing interests: "The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its

police power to protect the community from the dangerous tendencies of some who are mentally ill." Id. at 426, 99 S.Ct. at 1809.

[2,3] Due process protection thus requires in most cases that a person be accorded some type of hearing before being committed to a mental institution. In limited cases where the countervailing state interests are met, due process permits a period of involuntary commitment prior to a hearing as long as a hearing is held shortly after the initial detention.

We adopt Florida's statutorily-prescribed procedures to gauge what type of procedural process Burch was due.<sup>8</sup> At the

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<sup>8</sup> Because Burch does not allege that Florida's statutorily-prescribed procedures are constitutionally inadequate, we assume, without deciding, that they meet the requirements of procedural due process.

We are mindful that Pennhurst State



time that Burch was in the appellees' care, Florida law required a certain procedure for the emergency admission of mental health patients. See Fla.Stat. § 394.463(1)(1981)(since amended). This procedure allowed a mental health facility to provide emergency, involuntary treatment to a patient if the patient met certain criteria. Within forty-eight hours of the

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School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), holds that the Eleventh Amendment bars a federal court from granting relief against state officials on the ground that they violated state law. Florida's statutorily-protected procedures, however, have two independent sources: the United States Constitution and the Florida legislature. The Due Process Clause of the United States Constitution would still require some procedures for protecting liberty interests even if Florida's legislature had not prescribed any. Thus, we use Florida's procedures for illustrative purposes only and ground our holding in the procedures required by the Due Process Clause.

patient's admission, however, the facility had to (1) release the patient, (2) get his voluntary "express and informed consent to evaluation or treatment," or (3) initiate "a proceeding for court-ordered evaluation or involuntary placement." Id. § 394.463(1)(d).

Taking Burch's allegations as true, (1) he was not released until 152 days after his admission, well outside of the 48-hour limit; (2) although he signed authorization forms for admission and treatment at the request of ACMHS and FSH, he was incompetent to give voluntary, express, and informed consent; and (3) he was never provided with a proceeding for court-ordered evaluation necessary for involuntary placement. Consequently, Burch was not given the procedural process he was due before he was involuntarily committed to Florida State Hospital.

[4] The district court concluded that under Parratt and its progeny, Florida's postdeprivation procedures satisfied the requirements of due process and precluded a Section 1983 action. We do not share the district court's conclusion. Parratt does not apply to procedural due process violations when the state is in the position to provide predeprivation process.

As in Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987), the present case does not implicate Parratt. See also Patterson v. Coughlin, 761 F.2d 886, 892-93 (2d Cir. 1985), cert. denied, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986). In Fetner, the City Council possessed the authority to deprive Fetner of his property interest in continued employment. Similarly here, the state has clothed the appellees with the authority to deprive Burch of his liberty by enabling

them to determine whether Burch had given his voluntary, knowing, and express consent for admission. In contrast, in Parratt and similar cases, the defendants lacked state-clothed authority to deprive the plaintiffs of their protected property interests.

This Court recognized in Fetner that government officials abuse their state-clothed authority in depriving a person of a constitutionally protected interest when a postdeprivation hearing is practicable. This conclusion is consistent with Parratt. As this Court recognized in Fetner, "[t]he touchstone in Parratt was the impracticability of holding a hearing prior to the claimed deprivation."<sup>9</sup> 813

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<sup>9</sup> The requirement of "impracticability" is coextensive with Parratt's requirement that the conduct be "random and unauthorized." We read Parratt and its progeny to define

F.2d at 1185. Thus, "[p]ostdeprivation remedies do not provide due process if predeprivation remedies are practicable." Id. at 1186. In the present case, predeprivation procedures were practicable and thus postdeprivation remedies cannot provide due process.

Fetner teaches that a predeprivation hearing is practicable when officials have both the authority to predict that a hearing is required and the duty because of their state-clothed authority to provide a hearing. Similarly here, Burch has alleged

(continued from previous page)

"random and unauthorized" conduct as conduct of a state actor who lacks the state-clothed authority to deprive persons of constitutionally protected interests. In contrast, the conduct complained of in the present case is not within the meaning of "random and unauthorized" as introduced by Parratt and redefined by its progeny, but rather involves an abusive use of state-clothed authority.

that the appellees, who possessed state-clothed authority to deprive Burch of his liberty, abused that authority. A predeprivation hearing was practicable because the appellees had both the ability to predict that one was required and the duty because of their state-clothed authority to provide one.<sup>10</sup> Consequently, taking

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<sup>10</sup> Such a conclusion is consistent with the Supreme Court's reasoning in Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In the course of its decision, the Court rejected Palmer's contention:

that, because an agent of the state who intends to deprive a person of his property "can provide predeprivation process, then as a matter of due process he must do so." This argument reflects a fundamental misunderstanding of Parratt. There we held that post-deprivation procedures satisfy due process because the state cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no



Burch's allegations as true, his procedural due process rights were violated after he was committed beyond forty-eight hours

(continued from previous page)

consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

Id. at 534 (citation omitted) (emphasis in original).

We read Hudson v. Palmer as saying that state officials' ability to predict the need for predeprivation process (i.e., "can provide predeprivation process) does not remove the case from Parratt's reach. Rather, Hudson v. Palmer requires that "the state [be] in a position to provide for predeprivation process." In the present case, the state is in the position to provide predeprivation process. The state has clothed the appellees with the state's power to deprive persons of their liberty, and accordingly has clothed the appellees with the state's concomitant duty under Addington to provide predeprivation process. Where, as here, the state has reposed its power and concomitant duty with state officials, state officials as the state and thus the state is in a position to provide for predeprivation process. Hudson v. Palmer thus does not apply to the facts as alleged in Burch's complaint.

without a hearing.

## B. Deprivation of Liberty

[5] Although we conclude that Burch's complaint alleges a deprivation of liberty without procedural due process of law, we must determine if the deprivation that occurred rises to the level of a cognizable deprivation. The Supreme Court's recent decision in Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), serves as an instructive contrast. The Court "conclude[d] that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property." Id. at 663 (emphasis in original). The Court recognized that "abuse of power" was the touchstone for determining whether a deprivation was cognizable under the Due Process Clause: "Far from an abuse of power, lack of due care

suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." Id. at 665. The Court expressly noted that "this case affords us no occasion to consider whether something less than intentionally conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." Id. at 667 n. 3.

In the present case, Burch has alleged that the appellees "willful[ly], wanton[ly] and [with] reckless disregard" deprived him of his liberty without due process of law by having him sign forms for voluntary admission and treatment when he was not competent to do so. Although we are mindful that plaintiffs cannot simply invoke

such talismanic allegations to escape Daniels' reach, we hold that Burch has alleged a deprivation in the constitutional sense. As discussed below, Burch's deprivation of liberty stems from the abuse of power that the Due Process Clause and Section 1983 seek to deter.

C. State Action/Under Color of State Law.

[6] In a Section 1983 action predicated on a violation of the plaintiff's due process rights, a showing of state action serves a two-fold purpose. State action is necessary to establish the deprivation of the plaintiff's due process rights, and, when present, is also sufficient to meet the under-color-of-state-law requirement of Section 1983 itself. Lugar v. Edmondson Oil Co., 457 U.S. 922, 935, 102 S.Ct. 2744, 2752, 73 L.Ed.2d 482 (1982). "The ultimate issue in determining whether a person is

subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" Rendell-Baker v. Kohn 475 U.S. 830, 838, 102 S.Ct. 2764, 2770, 73 L.Ed.2d 418 (1982) (quoting Lugar, 457 U.S. at 937, 102 S.Ct. at 2753-43). The deprivation is "fairly attributable" to the state "when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions." Lugar, 457 U.S. at 937, 102 S.Ct. at 2754 (citing Monroe v. Pape, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961)). Specifically, "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" constitutes state action for the purposes

of the Fourteenth Amendment. See Lugar, 457 U.S. at 929, 102 S.Ct. at 2749-50 (quoting United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368(1941)).

In the present case, we conclude that state action exists.<sup>11</sup> The appellees' actions are fairly attributable to the state because only by being clothed with the authority of state law did the appellees possess the power to commit a person to a mental institution if the person provided voluntary, express, and informed consent. The appellees deprived Burch of

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<sup>11</sup> We express no view on whether, if liberally construed, Burch's complaint, through the incorporation of Exhibit G, alleges deprivation of Burch's liberty pursuant to an established state practice of not following the commitment procedures required by due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).



his liberty in a way not available to a private citizen.<sup>12</sup> Taking Burch's allegations as true, the appellees abused their state-clothed power by committing Burch to a mental institution without a hearing and without his voluntary, express, and informed consent.

We conclude that Burch's allegations that persons acting under color of state law deprived him of his liberty without due process of law state a procedural due process claim upon which relief could be granted. We express no view, however, as to whether in fact Burch is entitled to relief.

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<sup>12</sup> Such a conclusion distinguishes those Section 1983 cases seeking recovery based upon mere torts of state officials. In the present case, the appellees could only injure Burch because they abused the power given them as state officials; private citizens alone had no power to commit Burch for 152 days.

REVERSED and REMANDED to the district court for further proceedings not inconsistent with this opinion.

JOHNSON, Circuit Judge, specially concurring in which VANCE, KRAVITCH and HATCHETT, Circuit Judges, and TUTTLE, Senior Circuit Judge, join:

I write separately to set forth why I believe Burch's complaint has actually raised a claim for a substantive due process violation and why, on the merits, Burch has stated a claim upon which relief could be granted for such a violation. Substantive due process claims "are outside the scope of Parratt because the constitutional violation is complete at the moment when the harm occurs. The existence of state postdeprivation remedies therefore has no bearing on whether the plaintiff has a constitutional claim." Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir.

1985)(en banc), cert. denied, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986). A liberal construction of the pleadings indicates that Burch has sufficiently raised a claim for a substantive due process violation. Significantly, paragraphs 13 and 28 of the complaint allege that the appellees "deprived Plaintiff of his liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution." This allegation can encompass both substantive and procedural due process violations; Burch does not allege only deprivations of liberty "without procedural due process of law."

In addition, paragraphs 9 and 27 contain allegations of specific actions by the appellees that, if true, state a claim upon which relief could be granted for a sub-

stantive due process violation.<sup>1</sup> In these

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<sup>1</sup> Paragraph 9 provides:

Defendant [Apalachee Community Mental Health Services, Inc.] confined and imprisoned Plaintiff against his will from December 7, 1981, to December 10, 1981. Without authorization from Plaintiff, Defendant ACMHS examined and treated him during the same period and administered heavy medications to him with force and duress. Plaintiff was not represented by counsel and no hearing of any sort was held at which he could have challenged his involuntary confinement and treatment.

Paragraph 27 provides:

Defendants [Florida State Hospital employees], and each of them, knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH. See Exhibit G attached hereto and incorporated herein. Nonetheless, Defendants, and each of them, seized Plaintiff and against Plaintiff's will confined and imprisoned him and subjected him to involuntary commitment and treatment for the period of December 10, 1981, to May 7, 1982. For said period of 149 days, Plaintiff was without the benefit of counsel and no hearing of any sort was held at which he could have chal

two paragraphs, Burch alleges that he was detained and treated against his will for 152 days without any judicial determination that the state properly could detain and treat him.

In Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), the Supreme Court held that a state's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial violated the Fourteenth Amendment's due process requirement. From the Jackson reasoning, especially here in light of the state's extended deprivation of Burch's liberty, I would conclude that, when the state held and treated Burch beyond a reasonable time after which a

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lenged his involuntary admission and treatment at FSH.

hearing should have been held, Burch's detention and treatment gave rise to a claim for substantive due process violation. I ground this conclusion in the belief that the governmental action of which Burch complains belongs to the species of conduct that is unjustified because it is, in and of itself, antithetical to fundamental notions of due process. See Gilmere, 774 F.2d at 1499.<sup>2</sup>

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<sup>2</sup> Although during the en banc oral argument Burch's attorney stated in response to questioning that "I don't know that I have alleged any violations of substantive rights," follow-up questioning revealed that the complaint and its incorporated exhibits contained allegations of substantive due process violations. This follow-up colloquy is consistent with my conclusion, that, when the state held and treated Burch beyond a reasonable time after which a hearing should have been held, Burch's detention and treatment gave rise to a claim for substantive due process violation.



One final observation is in order. This Court recently noted that "a litigant proceeding in good faith has a right to use civil discovery in [an] attempt[] to prove the existence of a colorable claim for relief." Collins v. Walden, 834 F.2d 961, 965 (11th Cir. 1987). Today, this Court determines that Burch has stated a claim upon which relief could be granted for procedural due process violation and thus had remanded the case to the district court. On remand, if Burch's use of the discovery process produces evidence to support a claim for substantive due process violation, he has the right to amend his pleadings so that his pleadings conform with this evidence.

**CLARK**, Circuit Judge concurring:

I concur with Judge Johnson's comprehensive opinion. I write separately to express additional reasons why I conclude

that the district court's opinion should be reversed. First, this case is controlled by Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), and not by Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3914, 82 L.Ed.2d 393 (1984), or Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1098, 68 L.Ed.2d 420 (1981). Logan held that a postdeprivation state remedy does not satisfy "due process where the property deprivation is affected pursuant to an established state policy." Second, in addition to the deprivation of procedural due process right guaranteed by the Fourteenth Amendment, Burch was deprived of explicitly articulated freedoms contained in the Bill of Rights - his Fourth Amendment right "to be secure in [his] person[]" and to be free from seizure and detention without due process of law and his Fifth Amendment right not to be

"deprived of life, liberty or property without due process of law."<sup>1</sup>

I.

Any study of the progeny of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), must include consideration of Hudson and Logan. Those cases

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<sup>1</sup> In Hudson, the Court discussed the application of the Fourth Amendment. Justice O'Connor, in her concurring opinion, made reference to the constitutional sources that provide protection to the property of citizens: "Those sources are the due process and the takings clauses of the Fifth and Fourteenth Amendments, not the search and seizure clause of the Fourth Amendment." Hudson, 468 U.S. at 540, 104 S.Ct. at 3207 (O'Connor, J., concurring). For the purposes of deciding this case, it is not necessary for us to identify whether Burch's constitutional right derived from the Fourth or Fifth Amendments. Suffice it to say that the dissent is incorrect in urging that Burch had no constitutional right other than the right to procedural due process provided by the Fourteenth Amendment.

provide the framework for analyzing procedural due process claims like Burch's.

In Hudson, Palmer, a prisoner, alleged that Hudson had conducted a shakedown search of his cell and intentionally destroyed certain non-contraband personal property. Palmer claimed that he was entitled to damages under § 1983. The Supreme Court held that Palmer did not state a claim under § 1983 and that the reasoning in Parratt with respect to negligent deprivations of property applied also to intentional deprivations of property. The defendants in this case compare their deprivation of Burch's liberty to Palmer's property. Palmer contended that his case was controlled by the "established state procedure" language in Logan, arguing that:

the deliberate destruction of his property by petitioner constituted a due process violation despite the availa-

bility of postdeprivation remedies. Brief for respondent and cross-petitioner at 8. In Logan, we decided a question about which our decision in Parratt left little doubt, that is, whether a postdeprivation state remedy satisfies due process where the property deprivation is effected pursuant to an established state procedure. We held that it does not. Logan plainly has no relevance here.

Hudson, 468 U.S. at 534, 104 S.Ct. at 3204 (emphasis added). The irrelevance of Logan to Palmer's case was explained by an earlier statement in Hudson: "Two Terms ago, we reaffirmed our holding in Parratt in Logan . . . in the course of holding that postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." Id. at 532, 104 S.Ct. 3203.

The pointed inquiry in this case is whether the defendants' deprivation of Burch's liberty was effected pursuant to an

established state procedure. If it was not, this would be a Hudson-type case.<sup>2</sup> There was no "established state procedure" authorizing Hudson's deprivation of Palmer's property.

Since Burch was detained by the defendants pursuant to "an established procedure" set forth in Florida's Mental Health

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<sup>2</sup> The dissent argues that "the fact that the defendants' acted in contravention of their duties under state law only reinforces the conclusion that the acts of deprivation were random and unauthorized," Dissent, at slip op., 1888, \_\_\_\_ F.2d at \_\_\_\_\_. The defendants did not kidnap Burch as a random act in violation of their duties as citizens under state law. Their deprivation of Burch's freedom was authorized and done in the course of their employment as mental health professionals acting under color of and pursuant to Florida law. Their responsibility and consequent liability under § 1983 is no different from that of police officers who search a citizen's home, arrest the citizen and detain him at the jail, all without a warrant or proceeding before a magistrate. See Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).



statute, this case is controlled by Logan. To see why, it is necessary to analyze that case. Logan filed a timely complaint with the Illinois Fair Employment Practices Commission. Pursuant to a state statute, the commission had to convene a fact-finding hearing within 120 days of the filing of the complaint. "Apparently through inadvertence," the commission scheduled a hearing 5 days after the expiration of the statutory 120-day period. 455 U.S. at 426, 102 S.Ct. at 1152. The Illinois Supreme Court held that the commission's failure to hold the hearing within the 120-day period deprived it of jurisdiction to hear the merits of Logan's complaint. In an opinion by Justice Blackmun, a unanimous Supreme Court held that Logan's due process rights had been violated and as a consequence he was deprived of a protected interest, his claim to his job. The Logan

Court rejected the argument that Parratt was controlling, notwithstanding the fact that Illinois provided postdeprivation tort remedies which Logan could have pursued:

This argument misses Parratt's point. In Parratt, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." 451 U.S., at 541, 101 S.Ct., at 1915. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference -- whether the Commission's action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. See id., at 545, 101 S.Ct., at 1918 (second concurring opinion). Unlike the complainant in Parratt, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards."

Id. at 435-36, 102 S.Ct. at 1158.

As in Logan, the Florida state officials in this case were required by state law to secure a due process hearing and

were not authorized to detain Burch without securing the hearing. As in Logan, the failure of the Florida officials to arrange for a hearing was a deprivation of an "established state procedure." As in Logan, this failure caused a deprivation of a Fourteenth Amendment right, and a § 1983 claim can be pursued. Cf. Patterson v. Coughlin, 761 F.2d 886, 892 (2d Cir. 1985) (failure of state officials to provide inmate with a proper hearing was neither random nor unauthorized as those terms were meant in Parratt).

The Ninth Circuit, sitting en banc, recently recognized that "the Parratt analysis, in which the touchstone for predeprivation process is the feasibility of providing such process, is simply inapplicable where the alleged deprivation is inextricable from the alleged corruption of the process which the state ordinarily

could provide. . . . It is meaningless to speak of the state's ability to provide postdeprivation remedial process where the state process itself has been abused." Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985)(en banc). Parratt is therefore inapposite. Because Florida state law required a hearing within 48 hours of the initial confinement, state officials "were in a position to provide for predeprivation process." Hudson v. Palmer, 468 U.S. at 534, 104 S.Ct. at 3204.

The argument that Logan is controlling is made even more persuasive when one considers that the defendants in Parratt (loss of hobby kit), Daniels, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)(inmate's slip on pillow), and Davidson, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) (negligent failure to protect inmate), were not required to do anything by state law;

like many states actors and all citizens, they simply were not authorized to deprive persons of their constitutional rights. Logan is the only post-Parratt case in which the Supreme Court has considered a due process claim arising out of state officials' failure to hold a hearing as required by state law. As such, it should provide the guiding principle in this case, where the failure of Florida state officials to provide Burch with the required hearing led to a six-month deprivation of liberty.

## II.

Burch alleged in paragraph 13 of this complaint, "Defendant ACMHS deprived Plaintiff of his liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution." Part 11 of the dissent is directed toward the suggestion in Judge

Johnson's concurrence that Burch suffered a "substantive due process violation." I do not reach this question because the complaint clearly alleges a violation of Burch's liberty interest. As so precisely articulated by Justice Blackmun, who authored Logan, "At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived on a protected interest, and if so, what process was his due." Logan, 455 U.S. at 428, 102 S.Ct. at 1153-54.

The first inquiry is whether Burch had a protected interest. Urging that the majority makes no attempt to explain where in the Bill of Rights the framers may have implicitly articulated this right, the dissent asks this question: "[D]id they implicitly articulate it in the Fourth Amendment, which provides that '[t]he right



of people to be secure in their persons

. . . against unreasonable searches and seizures shall not be violated'?" Dissent, at slip op. 1892, \_\_\_\_ F.2d at \_\_\_\_.

The dissent's concerns are easily answered, for the Fourth Amendment was clearly implicated by the seizure and detention of Burch.

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common law antecedents. . . . Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while police submit their evidence to a magistrate. And, while the State's reasons for taking summary actions subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish mean-

ingful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

Gerstein v. Pugh, 420 U.S. 103, 111, 114, 95 S.Ct. 854, 861, 43 L.Ed.2d 54 (1975).

In Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), the Supreme Court establishes as clear precedent that Burch's liberty interest was such that it could not be taken without a probable cause finding:

By virtue of its "incorporation" into the Fourteenth Amendment, the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The probable cause determination "must be made by a judicial officer either before or promptly after arrest." Id. at 125, 95 S.Ct. at 869.

443 U.S. at 142-43, 99 S.Ct. at 2694. Baker was held in jail for three days because of a mistaken identification. His

arrest was pursuant to an arrest warrant issued by a magistrate which provided sufficient probable cause to hold him three days. Burch was provided with no probable cause hearing.

Florida, through its statute, gave the defendants the authority to deliberately deprive Burch of his liberty, just as it authorized police officers in Dade County to arrest Pugh and deprive him of his liberty. The Florida statute authorizing such action on the part of the defendants, however, also required those defendants to afford Burch a due process hearing before an impartial magistrate. Dissenting in Parratt, Justice Powell stated that § 1983 "was enacted to deter real abuses by state officials in the exercise of governmental powers." 451 U.S. at 549, 101 S.Ct. at 1920 (emphasis in original). Such an abuse occurred here.

If the philosophy of the dissent were to prevail, 42 U.S.C. § 1983 would be repealed by judicial fiat. Section 1983 guarantees a citizen access to the federal court system when state officials deprive him of a federal constitutional right without affording him a predeprivation or prompt post deprivation procedural due process hearing. The Supreme Court has not repealed § 1983 and neither should we.

ANDERSON, Circuit Judge, concurring specially in which GODBOLD, Senior Circuit Judge, joins:



I.

I agree with the result reached in Judge Johnson's opinion for the plurality - i.e., that Burch has sufficiently stated a claim of a procedural due process violation - but I cannot join Judge Johnson's reasoning as to why Parratt v. Taylor, 451

U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), does not apply to bar the instant case. Instead, I rely upon the reasoning set out in Part II. On the substantive constitutional issue, I agree with the result reached in Judge Tjoflat's opinion - i.e., that Burch has neither alleged a substantive constitutional violation nor intended to do so - but I cannot join all of Judge Tjoflat's reasoning. Instead, I rely upon the reasoning set out in Part III.

## II.

In my judgment, the reason that Parratt does not apply is that Burch has sufficiently alleged a deprivation pursuant to an established state procedure. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Burch alleged that each defendant "took part in admitting plaintiff . . . as a 'voluntary'

patient," that at the time of admission plaintiff was "disoriented, semi-mute, confused and bizarre in appearance and thought," that defendant's actions were taken "under the color and pretense of the statutes, ordinances, regulations, customs or usages of the State of Florida" and that each of the defendants "knew or should have known that plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission." Burch attached to the complaint Exhibit G, a letter from the Florida Department of Health and Rehabilitative Services, which provided: "This matter was discussed at the Human Rights Advocacy Committee for Florida State Hospital Meeting on August 4, 1983, and hospital administration was made aware that they were very likely asking medical patients to make decisions at a time when they were not mentally competent."



In the current Rule 12(b)(6) posture of this case, the test of course is whether it is beyond doubt that Burch can prove no set of facts which would establish a procedural due process violation. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). One such possible set of facts, as gleamed from Burch's allegations, is that at the two hospitals involved in this case there was an established custom or practice of obtaining voluntary consent forms when the patient was clearly not competent to consent.<sup>1</sup> Far from being "beyond doubt,"

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<sup>1</sup> Not only was this theory adequately alleged, it was also fairly represented to the district court. The applicability of Parratt was the major focus of the litigation at this early stage in the district court proceedings. Moreover, the "established state procedure" issue was specifically addressed. Burch's April 8, 1985, memorandum in response to defendant's motion to dismiss mentioned the established procedure theory several times. Record on Appeal, Document 16. In response, one of

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the defendants filed a supplemental memorandum arguing: "However, the post-deprivation remedies provided by Florida law are sufficient because the complaint does not allege a deprivation 'pursuant to some established state procedure.' Parratt, 451 U.S. at 537 [101 S.Ct. 1913-14]." Record on Appeal, Document 21 at 2. In response thereto, Burch filed a memorandum arguing:

Defendant ACMHS argues there is no policy under which its employees functioned with respect to admissions procedures. Yet the policy under which plaintiff was admitted to both ACMHS and FSH was not only acknowledged by the Florida Department of Health and Rehabilitative Services, the overseer of both entities, but eschewed. (See Plaintiff's Exhibit G attached to the Complaint with a copy attached hereto)

...  
Now defendant ACMHS asks this court to accept the proposition that irrespective of the fact that it regularly accepts persons as voluntary and involuntary admissions and regularly employs the above-referenced policy, it has no policy with respect to such admission procedures. Defendant ACMHS cannot claim the protection of established procedures for one purpose and deny the existence of those procedures for another.

such a practice is entirely conceivable, and perhaps all too tempting.

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Record on Appeal, Document 20. The memorandum again attached Exhibit G which indicated that the hospital was "very likely asking medicated clients to make decisions at a time when they were not mentally competent."

The issue was also fairly presented on appeal. Burch argued to the original panel that the Florida Department of Health and Rehabilitative Services had "conceded that the established procedure being used to admit medicated and disoriented patients

. . . by using involuntary admission and treatment forms was inappropriate and in violation of patient's rights." Brief at 9. See also Reply Brief at 5 ("ACMHS had an established custom of admitting and transferring incompetent patients on the basis of voluntary admission forms," citing Exhibit G that the hospitals "were very likely asking medicated clients to make decisions at a time when they were not mentally competent.")). Similarly, in his brief to the en banc court, Burch argued "that the defendants were acting pursuant to an institutionalized practice in their reliance on consent to commitment and treatment forms signed by persons who did not possess the capacity to give knowing and informed consent. . . . Such an institutionalized practice by defendants would also take Burch's claim outside the scope of Parratt." Brief at 12.

It is clear that such an established practice can constitute the kind of established state procedure contemplated in Logan, removing the element of randomness which is required for the application of the Parratt bar. In Wright v. Newsome, 795 F.2d 964 (11th Cir. 1986), a state prisoner asserted that he was deprived of property when prison officials confiscated and destroyed some of his legal materials during search of his cell. He asserted that similar confiscations had taken place in the past, in the face of court orders to the contrary and despite notice to the warden. This court concluded that "it could be inferred that searches and consequent confiscations unaccompanied by procedural safeguards are the sanctioned standard operating procedures at the [prison]." Id. at 967. The court held that Wright has sufficiently alleged that

the deprivation of his property was pursuant to an established state procedure and thus that Parratt was not applicable. Accord Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985)(in banc) (where prison officials miscalculated by five years prisoner's incarceration terms by employing formulae in a manner consistent with standard operating procedures, Logan rather than Parratt applies; "[w]here the injury is the product of the operation of state law, regulation, or institutionalized practice, it is neither random nor unauthorized, but wholly predictable, authorized, and within the power of the state to control"); Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984)(if plaintiff could establish that police had official policy of arresting and detaining suspects without probable cause and of confiscating suspects' property, then police actions con-

stitute established state procedure and Logan applies).

Accordingly, I conclude that Burch has adequately alleged a claim of a procedural due process violation.

### III.

I am not persuaded that Burch has alleged a substantive constitutional violation, or that he has intended to do so.

At oral argument to the in banc court, Burch candidly acknowledged that he had made no such claim.

Even liberally construed, a fair reading of the complaint alleges no substantive due process violation. The allegations of the complaint make it clear that Burch was seriously mentally ill. The law is clear that the State can confine such mentally ill persons, if appropriate procedural due process is afforded. Addington



v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Thus, I conclude that Burch has alleged only a procedural due process claim, not a substantive due process claim. There is no suggestion in the complaint that Burch was confined for political or other malevolent reasons or that there was other such abuse of state power that would "shock the conscience." Gilmere v. City of Atlanta, Ga., 774 F.2d 1495, 1500 (11th Cir. 1985) (in banc) (quoting from Rochin v. California, 342 U.S. 165, 172-73, 72 S.Ct. 205, 209-10, 96 L.Ed.. 183 (1952)).

TJOFLAT, Circuit Judge, dissenting in which RONEY, Chief Judge, and HILL, FAY and EDMONDSON, Circuit Judges, join:

This opinion is intended to serve two purposes. First, I dissent from the majority's holding that Burch has stated a claim for relief on procedural due process

grounds. Second, I write separately to respond to the suggestion by some members of this court that Burch's complaint state a substantive due process claim.

I.

In Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), a prison warden negligently lost a hobby kit which a prisoner had ordered through the mail. The prisoner sought relief in federal court under 42 U.S.C. § 1983(1982), alleging that he had been deprived of his property without due process of law. The Supreme Court first concluded that the plaintiff had suffered a deprivation of property in the fourteenth amendment sense, and then turned to the question of what process was due. The Court noted that the State had been foreclosed from providing a predeprivation hearing because the deprivation had resulted from "a random and unauthorized

act by a state employee," id. at 541, 101 S.Ct. at 1916, not an "established state procedure." Id. at 543, 101 S.Ct. at 1917. The Court observed that a deprivation such as the one suffered by the plaintiff "is in almost all cases beyond the control of the State." Id. at 541, 101 S.Ct. at 1916. Indeed, the Court observed, "the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." Id. at 543, 101 S.Ct. at 1917. In light of these circumstances, the Court concluded that the tort claims procedure available under state law provided all the process that the plaintiff was constitutionally due. Thus, although the plaintiff had suffered a deprivation of a protected interest, no constitutional violation had occurred. Accordingly, the

plaintiff had failed to state a claim for relief under section 1983.

Properly understood in light of Parratt, our task in this case is three-fold. We must first identify the nature of the deprivation that Burch has alleged. If we conclude that Burch has alleged a deprivation within the meaning of the fourteenth amendment, i.e., a deprivation of life, liberty, or property, we must then determine, guided by Parratt, whether the deprivation occurred in a manner such that the state would have been unable to provide Burch with predeprivation process. If we find that the state had no real opportunity to provide predeprivation process, we must determine whether available state tort claims procedures are sufficient to provide the process required by the fourteenth amendment.

It cannot be disputed that involuntary mental institutionalization at some point constitutes a deprivation of a protected liberty interest. See Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979). We can assume here that Burch was involuntarily institutionalized by persons acting under color of state law and that Burch has alleged a deprivation of liberty in the fourteenth amendment sense.<sup>1</sup> As emphasized above,

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<sup>1</sup> I assume only that Burch's confinement constituted a deprivation of liberty in the fourteenth amendment sense. The fact that Burch may have been denied the statutory procedures prescribed by Fla.Stat § 394.463 (1981)(amended 1984) does not implicate any interest cognizable under the fourteenth amendment. Burch may of course have a colorable claim that the defendants failed to follow the statutory procedures. But the eleventh amendment bars a federal court from granting relief against state officials on the ground that they violated state law. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

however, such an allegation, standing alone, is insufficient to state a claim for relief under section 1983. We must additionally find that Florida has foreclosed Burch from receiving that measure of process to which he is constitutionally entitled in light of the deprivation.

Given the nature of the acts that precipitated the deprivation in this case, it is difficult to see how the State had any more opportunity to provide predeprivation process than did the State in Parratt. As the plurality notes, Florida law establishes certain statutory procedures governing involuntary commitment. See Fla.Stat. § 394.463 (1981) (amended 1984). The Florida legislature designed these procedures to ensure that persons would not be wrongly deprived of liberty. The deprivation alleged by Burch was suffered at the hands of state employees acting in contra-



vention of the statutory procedures. The State surely could not anticipate that its employees would act in a manner contrary to its express command. Thus, like the warden's actions in Parratt, the employees' actions here were "beyond the control of the State" and "random and unauthorized." And, like the deprivation in Parratt, the deprivation here "occurred as the result of the unauthorized failure of agents of the State to follow established state procedure." The conclusion that the State here, like the State in Parratt, had no real opportunity to provide predeprivation process therefore seems inescapable.

The plurality<sup>2</sup> struggles to avoid this

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<sup>2</sup> Although eight of the thirteen members of the en banc court agree with Judge Johnson's conclusion that Burch's complaint states a procedural due process claim for relief, only six judges have joined in Judge Johnson's opinion. Judge Anderson,

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joined by Judge Godbold, would hold that Burch has stated a claim for relief on procedural due process grounds because he "has sufficiently alleged a deprivation pursuant to an established state procedure." Supra at slip op. 1883, F.2d at \_\_\_\_\_ (Anderson, J., specially concurring).

If Burch's complaint did in fact contain such an allegation, I would agree that the Parratt analysis does not apply. I do not agree, however, with Judge Anderson's reading of the complaint. Judge Anderson relies heavily on a letter that Burch appended to his complaint as "Exhibit G." That letter, sent to Burch by the Florida Department of Health and Rehabilitative Services, indicates that the administration of the Florida State Hospital had been "made aware that they were very likely asking medicated patients to make decisions at a time when they were not mentally competent."

This letter is an insufficient basis for reading Burch's complaint as making an allegation that he was wrongfully confined pursuant to an "established state procedure." To begin with, the letter does not say that the alleged error was common or routine. Nor does it show that the State condoned the behavior; indeed, it shows precisely the contrary. Moreover, it is highly questionable whether the exhibits attached to Burch's complaint can even be

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characterized as comprising part of Burch's allegations. Such exhibits are best characterized as evidence of the allegations presented in the typed complaint, and evidentiary matter of this kind can and should be deleted from the pleadings. See In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979); Control Data Corp. v. International Business Machs. Corp., 421 F.2d 323, 326 (8th Cir. 1970).

Even assuming that evidentiary exhibits, properly cross-referenced, can be viewed as part of the allegations in a complaint, nothing in Burch's typed complaint directed the district judge's attention to the specific sentence that Judge Anderson identifies as critical. The typed complaint referred to Exhibit G only in the following manner: "Para 27. Defendants, and each of them, knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at [Florida State Hospital]. See Exhibit G attached hereto and incorporated herein." The letter evidences the allegation in paragraph 27 because it contains the statement that Burch was "probably not competent to be signing legal documents" at the time of his admission to Florida State Hospital. Thus, in the single instance where the typed complaint contained a cross-reference to

conclusion by arguing that the defendants in this case have state-clothed authority" to deprive Burch of his liberty. The plurality apparently reasons that since the defendants were required by Florida law to observe certain predeprivation procedures,<sup>3</sup>

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Exhibit G, the allegation being made was not that Burch was wrongfully confined pursuant to some established state procedure, but rather that Burch was incompetent to sign a consent form.

At some point, the liberality of construction afforded pleadings must be circumscribed by the "plain statement" rule of Fed.R.Civ.P. 8(a). The vague sentence that Judge Anderson identifies as critical was buried in the more than twenty pages of evidentiary exhibits attached to Burch's complaint. In this context, it is patently unrealistic to expect the district judge to have seized upon that sentence and to have imagined that it set forth an allegation that the defendants' conduct was so customary as to make the Parratt analysis inapplicable.

<sup>3</sup> In focusing on the commitment procedures that Florida has statutorily prescribed, the plurality confuses two distinct due



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process concepts. A focus on state law would be appropriate were we in the position of a reviewing court deciding whether to order the release of a person being confined pursuant to an order issued under state law. In such a case, we would examine the procedures pursuant to which the confinement had been effected; if those procedures did not comport with the requirements of due process, we would issue an order requiring that the person be afforded a new hearing incorporating the procedures required by the Constitution. Cf. Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

This case presents a due process issue of a wholly different nature. Burch, now released, claims that he was deprived during his confinement of a liberty interest by state employees who did not follow certain confinement procedures mandated by state law. Presented with such a claim, our task as directed by the Supreme Court is to determine whether, given the

manner in which the alleged deprivation occurred, available postdeprivation redress in state court would provide Burch all the process he is due under the fourteenth amendment. If it would, Parratt tells us that no constitutional violation has occurred: the State has not denied Burch the process to which he is constitutionally due. Under clear Supreme Court precedent, see supra note 1, the fact that the state

their failure to do so somehow made their actions neither "random" nor "unauthorized" as those terms are used in Parratt.<sup>4</sup> The

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employees may have violated a state law in connection with the deprivation cannot support Burch's effort to state a section 1983 claim.

<sup>4</sup> By discussing whether the deprivation was "random" and "unauthorized" as those terms are used in Parratt, the majority implicitly accepts the notion that Parratt can apply to deprivations of liberty as well as deprivations of property. As the panel noted in its opinion, there is no basis for treating deprivations of life, liberty, and property differently insofar as the due process requirements of the fourteenth amendment are concerned. See Burch v. Apalachee Community Mental Health Servs., 804 F.2d 1549, 1554 (11th Cir. 1986). This view is consistent with Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), wherein the Supreme Court stated that

the dichotomy between personal liberties and property rights is a false one. Property does not have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to



logic of this argument escapes me. It could not be clearer that nothing in Florida law "authorized" the defendants to deprive persons of protected interests. Indeed, as already noted, the Florida legislature had established a detailed scheme designed to protect against such deprivations. To my mind, the fact that the defendants acted in contravention of their duties under state law only reinforces the conclusion that the acts of deprivation were random and unauthorized.

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travel, is in truth, a personal right, whether the 'property' in question be a welfare check, a home, or a savings account.

Id. at 552, 92 S.Ct. at 1122. In Parratt itself, the Supreme Court relied on a case involving a liberty deprivation. See Parratt, 451 U.S. at 542-43, 101 S.Ct. at 1916-17 (citing Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)).

The controlling inquiry under Parratt, which the plurality takes great pains to finesse, is whether the State could have anticipated the acts of deprivation such that it would have been in a position to provide predeprivation process. The State simply cannot anticipate acts of deprivation by state employees acting in contravention of their express duties under state law. See Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 199 (6th Cir. 1987).<sup>5</sup> The line of reasoning the plur-

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<sup>5</sup> Like the present case, Vinson involved a section 1983 action brought by a plaintiff claiming to have been falsely imprisoned as the result of conduct by a state employee acting in contravention of a duty imposed by the State. In Vinson, a probation officer employed by a county juvenile services department procured a summons requiring the plaintiff to appear at a hearing regarding her children's failure to attend school. The probation officer procured the summons in a manner that allegedly violated state law. The plaintiff did not comply with the summons, and was

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subsequently arrested for failing to appear at the hearing. She was confined for ten days and then released. Upon her release, she brought suit in federal district court, alleging inter alia that she had been deprived of procedural due process with respect to her confinement. The district court dismissed the claim, holding that (1) the state could not have anticipated the probation officer's actions, and (2) the plaintiff could file in state court an action for false imprisonment or abuse of process.

The Sixth Circuit, relying on Parratt, affirmed this part of the district court's ruling. The court of appeals reasoned that "the state could not have predicted that the [summons] procedure would not be followed and was in no position to provide predeprivation process because [the probation officer's] procurement of the alleged invalid summons, which resulted in the allegedly false imprisonment, was a random and unauthorized act." Vinson, 820 F.2d at 199. Thus, the Sixth Circuit has recognized that the key inquiry is whether the State could have anticipated the deprivation such that it would have been in a position to provide predeprivation process. More importantly, the Sixth Circuit has rejected the notion, central to the plurality's analysis here, that Parratt has no

rejected by the Supreme Court in Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). In Hudson, the Court made the following observations:

[the respondent] contends that, because an agent of the state who intends to deprive a person of his property 'can provide predeprivation process, then as a matter of due process he must do so.' . . . This argument reflects a fundamental misunderstanding of Parratt. There we held that postdeprivation procedures satisfy due process because the state cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

Id. at 535, 104 S.Ct. at 3204 (emphasis added).

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application where the defendant acted in violation of an express duty imposed by state law.

Our recent decision in Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987), is consistent with Hudson. Fetner involved a city council's termination of a city employee. The employee sued under section 1983, alleging that he had been deprived of a protected property interest without due process. The court concluded that Parratt did not apply. As the court noted, the termination was an "act of the City's highest governing board." Id. at 1185. Thus, since the city council members were the final policymakers with respect to termination policy, the acts precipitating the alleged deprivation were plainly neither random nor unauthorized. Accordingly, the council members had "ample time to give [the employee] notice and offer him an opportunity to be heard before they fired him." Id.

Here, in contrast to Fetner, the relevant final policymaking function did not reside with the agents whose acts precipitated the deprivation. Indeed, those agents acted in contravention of the stated policy of the relevant final policymaker, in this case the State. Under Parratt and Hudson, we must ask whether the final policymaker was in a position to anticipate the deprivation and thus provide predeprivation process. I do not see how we could answer that question otherwise than in the negative.

Under Parratt, if the State cannot anticipate a deprivation and is therefore unable to provide predeprivation process, state tort claims procedures may accord the plaintiff all the process due him under the fourteenth amendment. I would find that available Florida procedures accord the required measure of process.



If Burch can prove the facts he alleges in his complaint, he will be able to recover damages from defendant Apalachee Community Mental Health Services (ACMHS) under Florida law. Sovereign immunity will pose no obstacle; Florida has partially waived its sovereign immunity in its own courts. See Fla.Stat. §768.28 (1981).<sup>6</sup> With respect to his claims against the

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<sup>6</sup> At the time Burch's cause of action arose, Florida's sovereign immunity law stated as follows:

[a]ctions at law against the state or any of its agencies or subdivisions to recover damages in tort . . . for injury . . . caused by negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which . . . a private person would be liable to the claimant.

Fla.Stat. §768.28(1) (1981). The State has since amended the statute, but it adheres to the partial waiver of sovereign immunity.

Florida State Hospital (FSH) employees, Burch also has available to him state remedies adequate to provide the process due. Fla.Stat. §394.459(13) (1981) provides that "[a]ny person who violates . . . [the mental health act] shall be liable for damages." Although the statute excepts from liability persons who acted in good faith, it does not except persons merely because they acted negligently rather than intentionally.<sup>7</sup> Furthermore, Burch has a state law remedy for false imprisonment,

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<sup>7</sup> The law also limits the amount of money a claimant can recover from the State, and requires that a plaintiff submit a claim to the State within three years after it arises. None of these limitations, however, is so unreasonable as to deny Burch an "adequate" state remedy. See Parratt, 451 U.S. at 544, 101 S.Ct. at 1917 ("Although the state remedies may not provide . . . all the relief which may have been available . . . under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.")

see Johnson v. Weiner, 155 Fla. 169, 19 So.2d 699, 700 91944) (person who has been "unlawful[ly] restrain[ed] against his will" has actionable claim for false imprisonment), which, unlike the statutory remedy, has no good faith limitation.

Thus, I would hold that Burch has failed to state a claim for relief under section 1983. Although he has alleged a deprivation of a protected interest, no constitutional violation has been worked against him because the State has not denied him the process due under the fourteenth amendment.<sup>8</sup>

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<sup>8</sup> Judge Clark, concurring in the plurality's opinion, concludes that this case is controlled by the Supreme Court's decision in Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). I cannot agree.

Logan did not involve a civil rights action brought under 42 U.S.C. §1983 (1982). Logan involved a procedure before the Illinois Fair Employment Practices

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Commission. Under the Illinois Fair Employment Practices Act, a complainant had 180 days to lodge a charge of employment discrimination with the commission. The commission then had 120 days to convene a factfinding conference. Logan, an aggrieved employee, filed a timely charge, but the commission scheduled the fact-finding conference for a date five days after the 120-day period. Logan's former employer then moved the commission to dismiss the complaint on the ground that a timely conference had not been held. The commission denied the motion, and the employer sought a writ of prohibition to prevent the commission from holding the conference and granting relief. The Illinois Supreme Court reversed, holding that dismissal of Logan's complaint was required because the 120-day convening requirement was a jurisdictional prerequisite. The supreme court further held that the dismissal, even though it effectively denied Logan his day in court, did not violate any of Logan's rights under the equal protection or due process clauses of the fourteenth amendment.

Logan then appealed the Illinois Supreme Court's decision to the United States Supreme Court. Logan, 455 U.S. at 428, 102 S.Ct. at 1153. A proper depiction of the posture of the case before the Supreme Court is as follows: Logan, having



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been prevented by the Illinois court from prosecuting his employment discrimination claim, was requesting the Supreme Court to hold that the Illinois court system had arbitrarily denied him full use of the adjudicatory procedures established under Illinois law. As the Supreme Court made clear, the issue before it was whether the Illinois court had exceeded constitutional limitations by dismissing Logan's complaint. Id. at 429. 102 S.Ct. at 1154 ("[T]he Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."). Reaching the merits, the Supreme Court held that Logan's employment discrimination claim was a constitutionally protected property interest and that Logan was entitled to have his complaint processed. The ruling of the Illinois Supreme Court thus having been reversed, Logan was free to proceed with the prosecution of his claim.

As seen in the light of its true posture, then, Logan bears scant resemblance to the present case. This case does not involve a denial of due process by the Florida court system. Burch's complaint is not that the Florida court system denied him due process by, for example, foreclosing him from demonstrating his competence in a competency hearing that had been convened pursuant to state law.

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If that had been the case, this litigation would have taken a wholly different path: Burch's case, like the case in Logan would have first found its way to the state appellate courts; if they rejected Burch's constitutional claims, he would have appealed to the United States Supreme Court. The question before the Supreme Court would then have been whether the state court system had impermissibly interfered with Burch's right to litigate his competence at the competency hearing and thereby secure release from the state hospital.

It should be obvious that Parratt is inapplicable in a case presenting that kind of question. Suppose, for sake of argument, that the Supreme Court in Logan had dismissed the appeal on the ground that available state tort procedures provided Logan with all the process that was due. Presumably, the defendants in the contemplated tort action would be those persons responsible for the deprivation - the judges whose ruling allegedly denied Logan due process. We can assume an absence of judicial immunity. The basis of the tort action would be that the judges had wrongfully prevented Logan from making full use of the employment discrimination adjudicatory procedures. It is obvious, however, that any such claim would be precluded: since the United States Supreme Court had dismissed Logan's appeal, the



## II.

Some members of this court would conclude, as an alternative holding, that Burch has been denied a substantive constitutionally right. Supra at slip op. 1877, \_\_\_\_ F.2d at \_\_\_\_ (Johnson, J., spe-

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Illinois Supreme Court's ruling adverse to Logan would remain in effect and would estop Logan from claiming that he had been wrongfully denied full use of the employment discrimination adjudicatory procedures.

The Parratt analysis therefore could not have been intended to apply in cases where, as in Logan, the claim is that the state court system has denied the claimant due process and the claimant is seeking relief on appeal to the Supreme Court. In this sense, the due process claim in a case such as Logan is analytically indistinguishable from the claim in an appeal from a state conviction where the defendant contends that the trial judge denied him due process by, for example, admitting a coerced confession.

cially concurring).<sup>9</sup> For the reasons stated below, I would view such a holding as entirely unwarranted.

First, as the panel noted, Burch never raised a substantive due process claim. Burch v. Apalachee Community Mental Health Servs., 804 F.2d 1549, 1553 (11th Cir. 1986). During oral argument before the en banc court, Burch's counsel was asked if the complaint or the documents appended to the complaint contained any allegations that could be characterized as "deprivations of substantive rights." Burch's counsel replied, with commendable candor, "I do not know that I have alleged any violation of substantive rights." After carefully scrutinizing Burch's com-

<sup>9</sup> Only five members of the thirteen-member en banc court agree with that conclusion.

plaint, I too am unable to discern any such allegations.

Moreover, we are precluded from finding a substantive due process violation to the extent that Burch was mentally ill at the time of his confinement. This court has characterized substantive due process claims as "claims alleg[ing] that [the governmental conduct in question] would remain unjustified even if it were accompanied by the most stringent procedural safeguards." Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc), cert. denied, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986). There can be no question that the State, if it provides appropriate procedures, may confine mentally-ill persons. As the Supreme Court has observed, the State has a legitimate interest in effecting such confinement:

The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Addington v. Texas, 441 U.S. 418, 426, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979). Thus, to the extent that Burch was mentally ill at the time of his confinement, he is, under the definition set forth in Gilmere, precluded from stating a substantive due process claim.

When Burch was first admitted to ACMHS, he was obviously suffering from a mental illness. In the words of the plurality, he was "hallucinating, confused, disoriented, and clearly psychotic." Ante at slip op. 1872, \_\_\_\_ F.2d at \_\_\_\_\_. To state a substantive due process claim, then, Burch would have to allege two things: (1) that he recovered from his illness at some point

during his confinement, asked to leave, and was not permitted to leave, and (2) that the State, by not permitting him to leave under such circumstances, violated a substantive right guaranteed Burch under the Constitution.

We can assume for the sake of argument that Burch's complaint adequately alleges that he recovered from his illness at some point during his confinement and was not permitted to leave. In such a case, Burch's complaint would be that he was falsely imprisoned by state employees acting contrary to statutorily-prescribed procedures. This allegation, however, would not by itself be enough to support a substantive due process claim. The fourteenth amendment standing alone does not create a right to be free from false imprisonment by state employees. See Baker v. McCollan, 443 U.S. 137, 146, 99 S.Ct.

2689, 2696, 61 L.Ed.2d 433 (1979)("[F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.") It may be that such a right can be inferred from one or more of the amendments contained in the Bill of Rights, and is incorporated through the fourteenth amendment so as to be applicable to the states. But where in the Bill of Rights the framers implicitly articulate this right? Did they implicitly articulate it in the fourth amendment, which provides that "[t]he right of people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated"? Or did they implicitly articulate it in the eighth amendment, which provides that "cruel and unusual punishment [shall not be] inflicted"? Or did they somehow articulate it in the first, fifth, or sixth amendments?



Unless the members of the court who would hold that Burch has stated a violation of a substantive right can identify in the Constitution a substantive basis for that right, their analysis breaks down into an argument that substantive due process is implicated whenever an individual acting under color of state law engages in simple tortious conduct. Presented with such conduct, a court need only invoke the "antithetical to fundamental notions of due process" label in order to find a compensable substantive violation. Substantive due process claims under section 1983 thereby take on a dimension wholly independent of the substantive guarantees actually contained in the Constitution, a dimension as broad as the universe of common law tort theory. The Supreme Court has repeatedly admonished us that the fourteenth amendment is not "a font of tort law to be superim-

posed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 450 (1976). Yet nothing in the proposed analysis would prevent a court from, for example, transforming a garden variety common law libel action against a state employee into a section 1983 substantive due process claim.

The members of the court who would hold that Burch has stated a substantive due process claim apparently rely on this court's en banc decision in Gilmere v. City of Atlanta, 774 F.2d 1495 (1985), cert. denied, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986), a case also involving a substantive due process claim in the money damages context. Gilmere, I submit, suffers from the same infirmity that I have identified here. See id. at 1505 (Tjoflat, J., concurring in part and dissenting in

part). In that case, the court created a substantive constitutional right, independent of the fourth amendment, to be free from unreasonable and unnecessary force during police-citizen encounters. The court did so without indicating where in the Bill of Rights it found this substantive guarantee. Rather, the court justified its holding through selective quotations from Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952). See Gilmere, 774 F.2d at 1500 ("[S]ubstantive due process is violated by state conduct that 'shocks the conscience' or constitutes force that is 'brutal' and such as 'to offend even hardened sensibilities.'") (quoting Rochin, 342 U.S. at 172-73, 72 S.Ct. at 209). In my view, the Gilmere court clearly read Rochin out of context. Rochin involved a criminal case in which the defendant's conviction had been based

chiefly on evidence pumped from his stomach. The issue before the Supreme Court was not whether an individual has a substantive due process right not to have his stomach pumped; rather, it was whether the admission of evidence so obtained rendered the defendant's trial and conviction fundamentally unfair. Accordingly, Rochin does not speak to the issue of what kinds of claims would support a damages action based on the denial of substantive due process.<sup>10</sup>

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<sup>10</sup> Furthermore, the Gilmere court ignored the historical context in which Rochin was decided. Rochin was decided in 1952, nine years before the Supreme Court decided that the fourth amendment was incorporated through the fourteenth amendment so as to apply to the states. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The result in Rochin was the same result that would have been reached had the fourth amendment been applied. Rochin therefore does not support the proposition that due process comprehends a body of substantive rights independent of the guarantees actually contained in the Constitution. Rochin can be viewed as a har-

Even under the standards set forth in Gilmere, however, Burch's complaint does not state a substantive due process claim. As noted above, the en banc court in Gilmere held that an individual can state a claim for damages under section 1983 provided that the state conduct of which he complains is "brutal" and "shocks the conscience." The en banc court cited the following factors as appropriate for determining whether a substantive due process violation has occurred:

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binger of Mapp's holding that the fourteenth amendment incorporated the fourth amendment. This analysis also applies to other earlier decisions in which the Court ostensibly gave a broad reading to the concept of due process. Thus, for example, prior to the incorporation of the first amendment, the Court used a general concept of due process to invalidate a state law prohibiting private religious schools. See Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

[A] court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Gilmere, 774 F.2d at 1500-01 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973)). In the present case, the State provided treatment to an individual who was from all accounts clearly psychotic. The individual had been brought to the State by a concerned citizen who found the individual wandering along a highway. It is very difficult for me to see how the State's conduct in confining and treating this individual can be charac-



terized as sadistic, malicious, or shocking to the conscience.<sup>11</sup>

HILL, Circuit Judge, concurring in Judge TJOFLAT's dissenting opinion:

I concur in Judge Tjoflat's dissenting opinion.

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<sup>11</sup> Applying the factors set forth in Gilmere, the only allegation that even suggests a substantive due process violation must be inferred from a letter appended, along with several other documents, to Burch's complaint. That letter, dated April 4, 1984, contains a reference to a beating Burch allegedly received at the hands of one Benny Johnson, an FSH attendant. It is highly questionable whether a reference in a letter appended to a complaint can suffice to state a claim. See supra note 2. Yet even assuming that a beating was sufficiently stated as a ground for relief, the complaint would still have to be dismissed because Benny Johnson is not named as a defendant in the complaint and we are precluded from basing FSH's liability under section 1983 on a respondeat superior theory. See generally Monnell v. New York City Dept. of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Just over a half century ago - in 1936 - retaliation like Mr. Burch's suit was ridiculed by the then President of the United States, Franklin D. Roosevelt. In his first reelection campaign that year he spoke in Chicago. He observed that business and commerce had suffered during the depression and he claimed that his New Deal and other recovery policies had been therapeutic for those interests. Noting that what he termed "big business" opposed his reelection, Roosevelt likened that opposition to a patient's throwing his crutches at his doctor.<sup>1</sup>

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<sup>1</sup> Frank Kingdon in his book As FDR Said (Duell, Sloan & Pearce) quotes Roosevelt's Chicago address:

"Some of these people really forget how sick they were. But I know how sick they were. I have their fever charts. I know how the knees of our rugged individualists were trembling four years ago and how their hearts

Mr. Burch is like that. He seems to have forgotten how sick he was ("hallucinating, confused, disoriented, and clearly psychotic") when the good Samaritan<sup>2</sup> took him to Apalachee Community Mental Health

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fluttered. They came to Washington in great numbers. Washington did not look like a dangerous bureaucracy to them then. Oh no! It looked like an emergency hospital. All of the distinguished patients wanted two things - a quick hypodermic to end the pain and a course of treatment to cure the disease. They wanted them in a hurry; we gave them both. And now most of the patients seem to be doing very nicely. Some of them are even well enough to throw their crutches at the doctor.

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<sup>2</sup> The good Samaritan is, presumably, subject to suit for wrongful arrest or kidnapping. Burch was not, apparently, competent to consent to being carried to the mental health facility. Burch appears to be highly sensitive to being handled by those who have only his revocable consent.

Service. He is now recovered<sup>3</sup> and he seeks our imprimatur upon his suit against the providers of his therapy.— I was but an impressionable lad when I heard FDR's figure of speech. I carried an image of a patient flailing away at his doctor with his crutch. I had not, until now, personally encountered a living embodiment of the metaphor!

That is not to say that I should not find a constitutionally based claim for a state's misusing its psychiatric hospitals, asylums, or other facilities as a matter of state policy. I do not ignore reliable reports of such practices in other, totalitarian, nations. There, as a matter of

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<sup>3</sup> Burch's recovery appears from the fact that he sues on his own behalf and not through next friend or guardian ad litem. His lawyers have accepted him as a client and subjected him to litigation, presumably upon the basis of his consent.

established state procedure, dissidents, politically undesirables and other mentally competent people are said to be "diagnosed" as mental defectives and locked away in purported mental health facilities. I am here, though, raising a straw man for striking. It is not alleged - it is not even hinted - that the state of Florida has adopted a state policy of wrongfully confining competent people in its mental institutions.

It clearly appears that the "established state procedure" of Florida is quite equal to the demands of our Constitution. Perhaps Florida should have anticipated that those schooled in mental health instead of law might stumble into random, unauthorized errors in their attempts to comply with the state mandated procedures. That may be why the state provides for state court, state law, tort recoveries

for violations of its mental health act.  
Fla.Stat. § 394.459(13) (1981).



DARRELL BURCH, Plaintiff-Appellant,

v.

APALACHEE COMMUNITY MENTAL HEALTH  
SERVICES, INC., et al.,  
Defendants-Appellees.

No. 85-3843

United States Court of Appeals,  
Eleventh Circuit

March 5, 1987

Before RONEY, Chief Judge, GODBOLD,  
TJOFLAT, HILL, FAY, VANCE, KRAVITCH,  
JOHNSON, HATCHETT, ANDERSON, CLARK and  
EDMONDSON, Circuit Judges.\*

(Opinion December 3, 1986, 11 Cir.,  
1986, 804 F.2d 1549)

BY THE COURT:

A majority of the judges in active  
service, on the court's own motion, having  
determined that this case be reheard en  
banc.

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\* Senior U.S. Circuit Judge Elbert P.  
Tuttle has elected to participate in  
further proceedings in this matter pursuant  
to 28 U.S.C. 46(c).

IT IS ORDERED that the above cause  
shall be reheard by this court en banc with  
oral argument during the week of June 8,  
1987, on a date hereafter to be fixed. The  
clerk will specify a briefing schedule for  
the filing of en banc briefs. The previous  
panel's opinion is hereby VACATED.

DARRELL BURCH, Plaintiff-Appellant,

v.

APALACHEE COMMUNITY MENTAL HEALTH  
SERVICES, INC., et al.,  
Defendants-Appellees.

No. 85-3843

United States Court of Appeals,  
Eleventh Circuit.

Dec. 3, 1986.

Appeal from the United States District  
Court for the Northern District of  
Florida.

Before GODBOLD and TJOFLAT, Circuit  
Judges, and TUTTLE, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

In this case plaintiff presents us with a claim that the State of Florida deprived him of his constitutional right to due process of law by confining him in a hospital for the mentally ill without a judicial hearing to determine his need for hospitalization. The district court found that plaintiff failed to state a claim for

which relief can be granted. We now affirm.

I.

On December 7, 1981, an unidentified citizen found Darrell Burch wandering on the highway. Concerned for Burch, this citizen took him to the Apalachee Community Mental Health Services, Inc. (ACMHS), a facility designated to receive patients suffering from mental illnesses. Upon his arrival, Burch was confused and disoriented; one evaluation form states that Burch thought he was in heaven. At the request of ACMHS, Burch signed a voluntary admission form and an authorization for treatment form.<sup>1</sup>

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<sup>1</sup> Burch attached to his complaint, and incorporated therein by reference, all forms, documents, and correspondence mentioned in this opinion.

ACMHS diagnosed Burch as having paranoid schizophrenia and began to give him psychotropic drugs. The facility lacked the ability to give Burch the full treatment he needed, however, and transferred him to the Florida State Hospital in Chattahoochee, Florida (FSH) on December 10, 1981. Before transferring Burch, ACMHS had Burch sign a form requesting voluntary admission to FSH, along with a form authorizing treatment at FSH.

Upon his arrival at FSH, that facility also had him sign a request for voluntary admission form, despite the fact that he remained in a psychotic state. On December 23, 1981, FSH had Burch sign another authorization and treatment form. FSH kept Burch as a patient until May 7, 1982, allegedly against his will.

Burch subsequently sued ACMHS and the FSH employees (Employees) who were con-

nected with his admission or treatment.<sup>2</sup> Burch alleged that these defendants had confined and treated him against his will, without any judicial determination of his need for treatment as required by Florida law and the United States Constitution. Burch alleged that the defendants had deprived him of his liberty without due process of law and sought relief under 42 U.S.C. § 1983 (1982).<sup>3</sup>

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<sup>2</sup> Burch's complaint also named as a party defendant the county sheriff who had transported him from ACMHS to FSH. The sheriff, apparently having been dropped from the litigation, is not a party to this appeal.

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<sup>3</sup> 42 U.S.C. § 1983 (1982) provides the following:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,



[1] All of the defendants moved the district court to dismiss Burch's complaint for failure to state a claim upon which relief may be granted. The district court granted their motion, holding that under Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled on other grounds, Daniels v. Williams, U.S. \_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), Florida's post-deprivation procedures satisfied the requirements of due process and precluded a section 1983 ac-

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or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

tion.<sup>4</sup> Burch now appeals. As did the district court, we take the material allegations of Burch's complaint as true and construe them liberally in his favor. See Fundiller v. City of Cooper City, 777 F.2d 1436, 1439 (11th Cir. 1985).

## II.

At the time that Burch was in defendants' care, Florida law mandated a certain procedure for the emergency admission of mental health patients. See Fla.Stat. § 394.463(1) (1981) (amended 1984). This procedure allowed a mental health facility to provide emergency, involuntary treatment to a patient if the patient met certain

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<sup>4</sup> At the time Burch was confined, Florida provided that any person who violated a right guaranteed to a patient under state law would be liable to the patient, unless the defendant acted in a good faith attempt to comply with the law. See Fla.Stat. § 394.459(13) (1981); see also infra note 14 and accompanying text.

criteria.<sup>5</sup> Within forty-eight hours of the patient's admission, however, the facility had to release the patient, get his voluntary "express and informed consent to evaluation or treatment," or initiate "a proceeding for court-ordered evaluation or involuntary placement." Fla.Stat. § 394.463(1)(d) (1981) (amended 1982). A patient could enter (or remain in) a facility voluntarily if he "ma[de] application by express and informed consent for admission." Fla.Stat. § 394.465(1)(a) (1981).

[2] Taking Burch's allegations as true, we cannot doubt that he has a colorable claim that the defendants failed to follow the statutory procedure. The

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<sup>5</sup> Burch does not allege that Florida's statutorily-prescribed procedures were constitutionally inadequate.

Supreme Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), however, held that the eleventh amendment bars a federal court from granting relief against state officials on the ground that they violated state law. Thus, a plaintiff seeking federal relief against state officials must allege and prove a violation of the United States Constitution or of a federal law. Burch grounds his complaint in the due process clause of the fourteenth amendment, urging us to hold that the State deprived him of an unspecified substantive right or failed to grant him adequate procedures. We cannot comply.

[3] The due process clause of the fourteenth amendment gives rise to three types of claims: (1) for violations of incorporated provisions of the Bill of Rights; (2) for violations of the substan-



tive component of the due process clause; and (3) for violations of procedural due process. See Daniels v. Williams, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 662, 679, 88 L.Ed.2d 662 (1986) (Stevens, J., concurring); Gilmere v. City of Atlanta, 774 F.2d 1495, 1499-1502 (11th Cir. 1985) (en banc), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 1970, 90 L.Ed.2d 654 and U.S. \_\_\_\_, 106 S.Ct. 1993, 90 L.Ed.2d 673 (1986) (allowing recovery under § 1983 on two theories: violations of substantive due process and of the fourth amendment). Properly construed, Burch's claim falls in the third category.

[4,5] An individual has a protected liberty interest in remaining free from long-term mental institutionalization until he voluntarily seeks help or is involuntarily committed after a hearing. See Addington v. Texas, 441 U.S. 418, 425, 99

S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979) (the Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection") (citations omitted); see also Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (prisoner entitled to procedural safeguards before being transferred to mental institution). If the state follows the proper procedures, its confinement of an individual in need of care to a mental rehabilitation facility does not infringe upon any substantive right. See Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); cf. Gilmere, 774 F.2d at 1500 (defining substantive due process claims as those which "allege that certain governmental conduct would remain



unjustified even if it were accompanied by the most stringent of procedural safeguards." ). In this case, Burch cannot claim that the State of Florida lacked the constitutional power to place him, even involuntarily, into a hospital for treatment of his mental illness. Nor do we find in Burch's complaint any nonconclusory allegation that the governing boards or supervisory employees at ACMHS or FSH had a policy or regular practice of ignoring the State's regulations concerning the admission of patients needing mental care.<sup>6</sup>

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<sup>6</sup> Burch's complaint incorporates by reference a letter from the Florida Department of Health and Rehabilitative Services indicating that it had informed the administration of the Florida State Hospital that it was probably asking patients voluntarily to commit themselves when they were incapable of making such a decision. Nothing in Burch's complaint, however, alleges a hospital policy or regular practice to effect those commitments, and we find that the context of the letter makes this statement

Thus, we read Burch's complaint as alleging that ACMHS and Employees, by willfully<sup>7</sup> confining and treating him without a valid consent, deprived him of his procedural due process right to a judicial hearing.

### III.

The fourteenth amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). To prevent turning the due process clause into a mere duplication of the common law tort system, the Supreme Court in

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an insufficient basis for us to read his complaint as making such an allegation.

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<sup>7</sup> As we read Burch's complaint, he alleges that the defendants acted "willfully" in the sense of "having intent," not that they acted with malice toward him.

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled on other grounds, Daniels v. Williams \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), explained the circumstances under which a state could be found to have deprived an individual of his right to procedural due process.

In Parratt, a state prisoner sued the prison warden for allegedly depriving him of his property without due process of law. The plaintiff claimed that the warden's action, negligently losing a hobby kit that the plaintiff had ordered through the mail, entitled him to relief under section 1983. The Supreme Court disagreed. Implicitly holding that the defendants had not deprived the plaintiff

of any substantive due process right,<sup>8</sup> the Parratt Court found that the plaintiff's claim was one for a negligent deprivation of procedural due process. The Court then stated that "the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." Parratt, 451 U.S. at 539, 101 S.Ct. at 1915 (footnote omitted). Determining

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<sup>8</sup> We find this an implicit holding of Parratt because the prisoner's complaint, in alleging a deprivation of due process, did not differentiate between substantive and procedural due process. See Parratt, 451 U.S. at 529, 101 S.Ct. at 1910. In restricting its discussion to procedural due process, the Court obviously rejected any notion that the negligent deprivation of the prisoner's hobby kit could infringe a substantive right.



that the State could not provide any "meaningful predeprivation process" if it could not predict when its employees would violate its own law and that the State offered a sufficient, postdeprivation remedy in the state courts, the Court held that the State had not deprived the plaintiff of procedural due process.<sup>9</sup>

In Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the Supreme Court extended Parratt, holding that Parratt's reasoning also applied to intentional deprivations of property. In Hudson, a state prisoner sued a prison officer for allegedly destroying some of his property during a search of his cell.

<sup>9</sup> In Daniels v. Williams, U.S. \_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Supreme Court overruled Parratt to the extent that Parratt held that an official's negligence could implicate the due process clause.

The Court observed that a state can no more predict an employee's intentional disregard of state law than his negligent disregard and held that the postdeprivation remedy the State had made available to the prisoner satisfied the constitutional requirement of procedural due process..

A.

Both Parratt and Hudson dealt with plaintiffs' claims that the state had deprived them of their property without procedural due process. We must now decide whether the logic of Parratt and Hudson is applicable in this case.<sup>10</sup> We conclude

<sup>10</sup> In Gilmer v. City of Atlanta, 774 F.2d 1495 (1985) (en banc), cert. denied, U.S. \_\_\_, 106 S.Ct. 1970, \_\_\_, L.Ed.2d \_\_\_, and U.S. \_\_\_, 106 S.Ct. 1993, \_\_\_, 90 L.Ed.2d 654 (1986), this court held that Parratt's analysis did not apply to cases where a plaintiff had been deprived of a substantive rather than procedural, constitutional right. In a footnote, we noted in dictum that Parratt might also be limited



that the language of the fourteenth amendment, and Supreme Court precedent, demand that we avoid the treacherous path of attempting to rank the three fundamental rights mentioned together in the due process clause.

[6] The fourteenth amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S.Const.amend.XIV, § 1. The Reconstruction Congress adopted the amendment, at least in part, to protect the substance of the Civil Rights Act of 1866 from claims that it was unconstitutional and to prevent future congresses from

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to cases involving property claims and not apply to allegations of procedural deprivations of life or liberty. Id. at 1499 n. 4. As we noted there, however, "our disposition of this case makes it unnecessary for us to use this form of analysis." Id.

easily repealing the federal protection of citizens against state abuses. See Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich.L.Rev. 1323, 1328-29 (1952); see also Lynch v. Household Finance Corp., 405 U.S. 538, 544, 92 S.Ct. 1113, 1118, 31 L.Ed.2d 424 (1972). Both the language and the legislative history of the Civil Rights Act of 1866 leave no doubt that the post-war Congress passed the Act out of concern for both the liberty and right to own property of newly freed slaves, without distinguishing between the relative importance of these rights. See Gressman, supra, at 1325-27. This brief history of legislation enacted before the adoption of the fourteenth amendment indicates to us that the framers of that amendment valued all three rights protected by the due process clause; rather than ranking

these rights, the Congress chose to protect all of them from abusive state power.

Our conclusion is unsupported by the legislative history of the Civil Rights Act of 1871, which included the section now codified at 42 U.S.C. § 1983. In that act, through which Congress sought to enforce the fourteenth amendment, Congress substantially reenacted the Civil Rights Act of 1866. Here again, Congress demonstrated equal concern for life, liberty, and property:

[T]he rights that Congress sought to protect in [that] Act . . . were described by the chairman of the House Select Committee that drafted the legislation as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety."

Lynch, 405 U.S. at 545, 92 S.Ct. at 1118 (quoting Rep. Shellabarger, Cong. Globe, 42d Cong., 1st Sess., App. 69 (1871) (other citations omitted)); see also Note, Civil

Procedure: Section 1343(3) Jurisdiction and the Property-Personal Right Distinction, 1970 Duke L.J. 819, 833-37, 833 ("[T]he framers of the fourteenth amendment and the 1871 Act from which both section 1983 and section 1343(3) were derived evidenced no intention to distinguish between the protection of proprietary or personal interests.") (footnote omitted).

To hold that a plaintiff's claim that the state denied him procedural due process regarding a liberty right is constitutionally distinct from a similar claim relating to a property right would take us into the eddies of confusion and inconsistencies that the Supreme Court forsook in Lynch. Prior to that case, the court attempted to resolve a seeming inconsistency among jurisdictional statutes by differentiating between property rights and the rights to life and liberty. See Hague v.



C.I.O., 307 U.S. 496, 527-32, 59 S.Ct. 954, 969-71, 83 L.Ed. 1423 (1939) (plurality) (Stone, J., concurring) (requiring minimum jurisdictional amount for property claims, but not liberty claims, under predecessor to section 1983). This approach led to unsupportable line drawing and generated much criticism. See Lynch, 405 U.S. at 551 n. 20, 92 S.Ct. at 1121 n. 20 (citing scholarly criticism and confusion among the courts); see also Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L.Rev. 482, 486 (1982) ("The Court has toyed with intermediate approaches under which section 1983 protects only 'civil' rights or only 'personal' rights, but these never have come to represent a coherent approach to the section.") (footnote omitted). In Lynch, the Court reexamined the legislative history of the fourteenth amendment and the civil

rights laws enacted pursuant to it and concluded that:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account.

Lynch, 405 U.S. at 552, 92 S.Ct. at 1122. We find no reason to question Lynch's continuing vitality and thus have no reason to limit Parratt and Hudson to cases involving property claims.

[7] We note that we are not the first court to conclude that the law should analyze claims alleging the deprivation of procedural due process in an identical fashion, regardless of whether the procedure affected the right to life, liberty, or property. Two other courts of appeals have reached the same conclusion as we do



today. See Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985)(en banc) ("When the underlying rationale of Parratt v. Taylor is considered, the conclusion that its holding applies only to the deprivation of property lacks foundation."); Thibodeaux v. Bordelon, 740 F.2d 329, 339 (5th Cir. 1984), ("[W]e hold that Parratt applies to deprivations of liberty. . . ."). Similarly, in Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984)(en banc), aff'd, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Court of Appeals for the Fourth Circuit held that the plaintiff's claim that the State deprived him of his liberty without due process of law was untenable, because negligent acts do not implicate the fourteenth amendment and, alternatively, because under Parratt the plaintiff had failed to show inadequate state remedies to redress his liberty

claim. Cf. Ellis v. Hamilton, 669 F.2d 510 (7th Cir.), cert. denied, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982) (holding that available state remedies precluded plaintiff's claim that she was deprived of liberty interest without procedural due process). Other courts have distinguished Parratt on other grounds, as our en banc court did in Gilmere, and have thus decided whether property claims are distinct from life or liberty claims. See Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 3333, 92 L.Ed.2d 379 (1986) (Parratt does not apply to state action taken pursuant to established policy); Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985) (en banc) (same); Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 106

S.Ct. 879, 88 L.Ed.2d 916 (1986) (Parratt applies only to random acts).

We find additional support for our position in recent decisions of the Supreme Court. In Daniels v. Williams, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 668, 88 L.Ed.2d 662 (1986), and Davidson v. Cannon, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), the Court examined the state of mind requirement for a section 1983 case. Both cases involved an alleged liberty deprivation, and in both cases, the Court held that mere negligence does not "deprive" an individual of his liberty as the term is used in the fourteenth amendment. In neither case did the Court indicate that it would have ruled any differently had the alleged deprivation involved life or property.

Finally, in Parratt itself the Supreme Court stated that its analysis was harmo-

nious with that of Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), which involved the alleged deprivation of a liberty interest. See Parratt, 451 U.S. at 542, 101 S.Ct. at 1916. In Ingraham two students claimed that, among other things, the due process clause entitled them to notice and a hearing before public school officials inflicted corporal punishment. Ingraham, 430 U.S. at 653, 97 S.Ct. at 1403. The Supreme Court agreed "that corporal punishment in public schools implicates a constitutionally protected liberty interest, but [held] that the traditional common-law remedies are fully adequate to afford due process." Id. at 672, 97 S.Ct. at 1413. Thus, despite the presence of a recognized liberty claim, the Court found that state tort law provided sufficient protection against official abuse to afford all of the constitutionally



required due process. See id. at 676-78, 97 S.Ct. at 1415-16. In light of the liberty deprivation at issue in Ingraham, we see the Parratt Court's approving citation to that case as further proof that the Parratt test equally applies to cases involving liberty or property claims.<sup>11</sup>

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<sup>11</sup> Our decision today does not, of course, mean that every state remedy that is "adequate" for one interest protected by the due process clause is necessarily adequate for another. Cf. Thibodeaux v. Bordelon, 740 F.2d at 329, 338 n. 9 (5th Cir. 1984); Smolla, The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company, 1982 U.Ill.L.Rev. 831, 871 ("adequacy" is a matter of federal constitutional concern). We note that a party relying on an "adequate state remedy" argument, or seeking to defeat such an argument, has a duty to demonstrate that predeprivation remedies are or are not possible, and that postdeprivation remedies are or are not available and adequate. An investigation of "adequacy" must, of course, consider the extent to which a state has waived its sovereign immunity and whether individual defendants are somehow insulated from liability.

B.

[8] Having concluded that Burch's claim is one for a deprivation of procedural due process and that Parratt and Hudson are controlling, we must now examine whether Burch has established a claim cognizable in federal court. First, we find that Florida could not offer a meaningful predeprivation process under the facts Burch alleges. As we stated earlier, at the time of Burch's confinement Florida had established a system for the involuntary commitment of people with mental disorders. The State had designed its laws to ensure that a person would not be wrongly deprived of his liberty. See Fla.Stat. § 394.463(1) (1981) (amended 1982). Burch has not alleged that Florida's statutory procedures were constitutionally inadequate; nor has he made a colorable claim that the governing boards of ACMHS or FSH



had a policy, custom, or regular practice of not following the mandated procedure. In light of these facts, we cannot see how Florida could predict that in Burch's case its employees at ACMHS and FSH would ignore the State's command. Thus, as in Parratt and Hudson, this case does not present a situation where the state could establish any type of predeprivation hearing, beyond that provided by the statutory commitment procedures, to protect Burch from random and unauthorized acts.

[9] We next examine Florida law to see if it provides an adequate remedy for the harm Burch allegedly suffered. We find that the State provides a constitutionally adequate remedy.

[10] If Burch can prove the facts he alleges, Florida law would allow him to recover damages from ACMHS. Even though Burch alleges that ACMHS is a state agency,

the State has partially waived its sovereign immunity in state courts, thus eliminating that possible obstacle to a lawsuit. See Fla.Stat. § 768.28 (1981)<sup>12</sup>

<sup>12</sup> At the time Burch's cause of action arose, Florida's sovereign immunity law stated in relevant part that:

[a]ctions at law against the state or any of its agencies or subdivisions to recover damages in tort . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which . . . a private person, would be liable to the claimant.

Fla.Stat. § 768.28(1) (1981). The State has since amended the statute, but adheres to its partial waiver of sovereign immunity. Although the law does limit the amount of money a claimant can recover from the State, and requires that a plaintiff submit a claim to the State within three years after it arises, neither provision is so unreasonable as to deny Burch an "adequate" state remedy. See Parratt v. Taylor, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917 (1981), overruled on other grounds, Daniels v. Williams, U.S. , 106 S.Ct. 622, 88 L.Ed.2d. 622 (1986) ("Although the state remedies may not pro-

Commercial Carrier Corp. v. Indian River County, 317 So.2d 1010 (Fla. 1979) (sovereign immunity waived for decisions not involving broad policy or planning matters). Thus, we conclude that existing state law provides Burch with a sufficient opportunity to pursue his claim against ACMHS in state court to comport with due process.<sup>13</sup> Similarly, although Burch chose not to sue FSH as an entity, we see no reason why he could not rely on Florida's

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vide . . . all the relief which may have been available . . . under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.").

<sup>13</sup> Under any reading of § 1983 and Parratt, Burch would lack a federal cause of action against ACMHS if further development of the facts disclosed that the facility was not acting "under color" of state law. He could, of course, sue the clinic in state court under state tort law.

partial waiver of sovereign immunity to seek recovery from that state agency.

We also conclude that Burch has adequate state remedies available to him in his suit against Employees. Fla.Stat.. § 394.459(13) (1981) provides that "[a]ny person who violates . . . [the mental health act] shall be liable for damages." The law excepts those who acted in good faith compliance, but does not immunize a person from liability merely because his act was negligent rather than intentional.<sup>14</sup> In addition to the statute,

<sup>14</sup> In full, Fla.Stat. § 394.459(13) provided that :

Any person who violates or abuses any rights or privileges of patients provided by this act shall be liable for damages as determined by law. Any person who acts in good faith in compliance with the provisions of this part shall be immune from civil or criminal liability for his actions in connection with the admission, diag



however, Burch's allegations also contain the elements of the common law tort of false imprisonment. Florida authorizes suits on that tort theory when a person has been "unlawful[ly] restrain[ed] . . . against his will." Johnson v. Weiner, 155 Fla. 169, 19 So.2d 699, 700 (1944).

IV.

[11] In sum, we find that the principles of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled on other grounds, Daniels v. Williams, \_\_\_ U.S. \_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), are controlling in this case, where "the deprivation occurred as a result

nosis, treatment, or discharge of a patient to or from a facility. However, this section shall not relieve any person from liability if such person is guilty of negligence.

of the unauthorized failure of agents of the State to follow established state procedure." Parratt, 451 U.S. at 543, 101 S.Ct. at 1917. Burch's claim is, at most, one for damages resulting from the denial of procedural due process, and Florida provides him with a postdeprivation remedy sufficient to satisfy the Constitution's requirement. The judgment of the district court is, accordingly,

**AFFIRMED.**<sup>15</sup>

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<sup>15</sup> ACMHS also urges that we affirm the district court on the grounds that Burch's claim was impermissibly predicated upon the doctrine of respondeat superior liability and that it is not a "person" under section 1983. All defendants also claim that they are protected from liability by the eleventh amendment. Because of our disposition of this case, we need not reach these contentions.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

DARRELL BURCH,

Plaintiff,

v.

TCA 85-7081-WAS

APALACHEE COMMUNITY  
MENTAL HEALTH SERVICES,  
INC., et al.,

ORDER

Defendants.

This cause comes before the court on defendants' motions to dismiss (documents 13 and 15). Plaintiff has brought this suit pursuant to 42 U.S.C. § 1983. The complaint alleges that the defendants deprived the plaintiff of his liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

On December 7, 1981, plaintiff was admitted to defendant Apalachee Community Mental Health Services (ACMHS) after having

been found wandering about and taken to ACMHS by a concerned citizen. At this time, plaintiff was disoriented and confused. He was admitted to ACMHS, however, after having signed a "Request for Voluntary Admission," which requires, under Chapter 394 of the Florida Statutes, the expressed and informed consent of the applicant. On December 10, 1981, plaintiff was transferred to the Florida State Hospital at Chattahoochee, where he also signed a "Request for Voluntary Admission" while disoriented and medicated. It is doubtful whether plaintiff was competent on either occasion to sign such papers. Plaintiff was released from Florida State Hospital on May 7, 1982.

The defendants' motions to dismiss are based principally on their position that the plaintiff has not stated a claim under 42 U.S.C. § 1983 for which relief can be

granted. In support of this position, defendants cite Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420 (1981).

Parratt involved the § 1983 claim of a prison inmate who had been deprived of property (a hobby kit) through the negligence of prison officials. The Court there held that the deprivation of property by prison officials did not violate the Due Process Clause of the Fourteenth Amendment because, although it was done by persons acting under color of law, it was not done according to any established State procedures. The deprivation had in fact occurred as a result of the unauthorized failure of individuals to follow the established procedures, which were themselves adequate. It was not practicable to provide for a pre-deprivation hearing, as one could not predict when such unauthorized conduct would occur. In addition, there

was adequate provision for post-deprivation remedies under State law. Therefore, due process was not violated.

The defendants further cite Hudson v. Palmer, 468 U.S. \_\_\_\_\_, 82 L.Ed.2d 393 (1984), wherein the Court extended the rule of Parratt to include actions for the intentional deprivation of property. The Court again focused on the adequacy of post-deprivation relief and the impracticability of pre-deprivation hearings.

Finally, the defendants cite the Eleventh Circuit Court of Appeal's decision in Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), in support of their motions to dismiss. That case further extended the rationale of Parratt to include intentional deprivations of liberty. The Eleventh Circuit there found that the City of Atlanta had not violated § 1983 in the arrest and shooting death of a



suspect. Again, the dispositive factors were that a pre-deprivation hearing was impracticable or impossible and that Georgia statutes provide an adequate post-deprivation remedy.

In light of the above cases, it appears that plaintiff in this case has not established a claim under 42 U.S.C. § 1983. The procedures regarding voluntary and involuntary placement of persons in a facility for treatment of mental health disorders are set out in Chapter 394, Florida Statutes. The procedures established for both are adequate to insure due process of law. In this case, however, it appears that the staff of ACMHS and the Florida State Hospital did not follow the proper procedures for involuntary placement, because it appeared that plaintiff was not competent to decide for himself whether he should be voluntarily admitted to either or

both facilities. As in Parratt, Hudson, and Gilmere, it would have been impracticable, if indeed not impossible, to provide adequate pre-deprivation process to the plaintiff. Florida Statutes also provide for adequate post-deprivation remedies, in the form of review of continued voluntary and involuntary placement and, finally, for the awarding of damages to those who have been injured as a result of tortious action of those responsible for a patient.

Although defendants raise other issues in their motions to dismiss, in light of the disposition of the above issue, it is not necessary to reach those here.

Accordingly, it is ORDERED:

1. Defendants' motions to dismiss (documents 13 and 15) are GRANTED.
2. The Clerk of the Court is ordered to enter judgment, with costs, in favor of the defendants.



DONE and ORDERED this 26th day of  
September, 1985.

/s/  
**WILLIAM STAFFORD**  
**CHIEF JUDGE**

## UNITED STATES CONSTITUTION

### ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to that person within its jurisdiction the equal protection of the laws.

**CIVIL ACTION FOR DEPRIVATION OF  
RIGHTS**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**SECTION 349.459 (1981)**

**394.459 Rights of patients. --**

(1) **RIGHT TO INDIVIDUAL DIGNITY. --** The policy of the state is that the individual dignity of the patient shall be respected at all times and upon all occasions, including any occasion when the patient is taken into custody, detained, or transported. Procedures, facilities, vehicles, and restraining devices utilized for criminals or those accused of crime shall not be used in connection with the noncriminal mentally ill except for the protection of the patient or others. The noncriminal mentally ill shall not be detained or incarcerated in the jails of this state. In criminal cases, a jail may be used as an emergency facility no longer than 45

days. Treatment shall be provided to the patient by his mental health professional or the receiving facility staff. No person who is receiving treatment for mental illness in a facility shall be deprived of any constitutional rights. However, if such a person is adjudicated incompetent pursuant to the provisions of this part, his rights may be limited to the same extent the rights of any incompetent person are limited by general law.

(2) RIGHT TO TREATMENT.

(a) The policy of the state is that the department shall not deny treatment for mental illness to any person, and that no services shall be delayed at a receiving or treatment facility because of inability to pay.

(b) It is further the policy of the state that the least restrictive available treatment be utilized based upon the indi-

vidual needs and best interests of the patient.

(c) Each person who is admitted to a receiving or treatment facility, and each person who remains at a facility for a period in excess of 12 hours, shall be given a physical examination by a health practitioner authorized by law to give such examinations within 24 hours after arrival at such facility.

(3) RIGHT TO EXPRESS AND INFORMED PATIENT CONSENT

(a) All persons entering a facility shall be asked to give express and informed consent for treatment after disclosure to the patient if he is competent, or his guardian if he is a minor or is incompetent, of the purpose of the treatment to be provided, the common side effects thereof, alternative treatment modalities, the approximate length of care, and that



any consent given by a patient may be revoked orally or in writing prior to or during the treatment period by the patient or his guardian. If a voluntary patient refuses to consent to or revokes consent for treatment, such patient shall be discharged within 3 days or, in the event the patient meets the criteria for involuntary placement, such proceedings shall be instituted within 3 days. If any patient refuses treatment and is not discharged as a result, treatment may be rendered such patient in the least restrictive manner on an emergency basis, upon the written order of a mental health professional when such mental health professional determines treatment is necessary for the safety of the patient or others. If any patient refuses to consent to treatment or revokes consent previously provided, and if, in the opinion of the patient's mental health

professional, the treatment not consented to is essential to appropriate care for such patient hereunder, then the administrator shall immediately petition the hearing examiner for a hearing to determine the competency of the patient to consent to treatment. If the hearing examiner finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate, who shall act on the patient's behalf relating to provision of express and informed consent to treatment. A guardian advocate appointed pursuant to the provisions of this act shall meet the qualifications of a guardian contained in part IV of chapter 744, except that no mental health professional, departmental employee, or facility administrator shall be appointed.

(b) In addition to the provisions of paragraph (a), in the case of surgical procedures requiring the use of general anesthetic or electroconvulsive treatment, and prior to performing the procedure, written permission shall be obtained from the patient, if he is legally competent, from the parent or guardian of a minor patient, or from the guardian of an incompetent patient. The facility administrator or his designated representative may, with the concurrence of the patient's attending physician, authorize emergency surgical treatment if such treatment is deemed life-saving and permission of the patient or his guardian or representative cannot be obtained.

(c) When the department is the legal guardian or representative of a patient, or is the custodian of a patient whose physician is unwilling to perform surgery based

solely on the patient's consent and whose parent or legal guardian is unknown or unlocatable, a court of competent jurisdiction shall hold a hearing to determine the appropriateness of the surgical procedure. The patient shall be physically present, unless the patient's medical condition precludes such presence, represented by counsel, and provided the right and opportunity to be confronted with, and to cross-examine, all witnesses alleging the appropriateness of such procedure. In such proceedings, the burden of proof by clear and convincing evidence shall be on the party alleging the appropriateness of such procedure.

\* \* \*

(13) LIABILITY FOR VIOLATIONS. Any person who violates or abuses any rights or privileges of patients provided by this act



shall be liable for damages as determined by law. Any person who acts in good faith in compliance with the provisions of this part shall be immune from civil or criminal liability for his actions in connection with the admission, diagnosis, treatment or discharge of a patient to or from a facility. However, this section shall not relieve any person from liability if such person is guilty of negligence.

FLORIDA STATUTE  
SECTION 394.463 (1981)

394.463 Admission for emergency or evaluation.

(1) EMERGENCY ADMISSION.

(a) Criteria. A person may be admitted to a receiving facility on emergency conditions if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injure himself or others if allowed to remain at liberty; or

2. In need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf, and an ex parte order is obtained authorizing the admission.

(b) Initiation of proceeding. An emergency admission may be initiated as follows:



1. A judge may enter an ex parte order stating that a person appears to meet the criteria for emergency admission, giving the findings on which that conclusion is based and directing that a law enforcement officer take the person into custody and deliver him to the nearest receiving facility for emergency examination and treatment. The order of the court shall be made a part of the patient's clinical record; or

2. A law enforcement officer may take a person who appears to meet the criteria for emergency admission into custody and deliver him to the nearest receiving facility for emergency examination and treatment. The officer shall execute a written report detailing the circumstances under which the person was taken into custody, and the report shall be made a part of the patient's clinical record; or

3. A mental health professional may execute a certificate that he has examined a person within the preceeding 48 hours and finds that the person appears to meet the criteria for emergency admission, stating the observations upon which that conclusion is based. The mental health professional's certificate shall authorize a law enforcement officer to take the person into custody and deliver him to the nearest available receiving facility for emergency examination and treatment. The law enforcement officer shall execute a written report detailing the circumstances under which the person was taken into custody. The report and the mental health professional's certificate shall be made a part of the patient's clinical record.

(c) Emergency examination. A patient who is admitted for an emergency examination and treatment by a receiving

facility shall be examined by a mental health professional without unnecessary delay, and may be given such treatment as is indicated by good medical practice.

(d) Release of patient. At any time the examining mental health professional concludes that the patient need not be retained in a receiving facility or that further evaluation is not necessary, the patient shall be discharged immediately unless the patient is under criminal charges, in which case he shall be returned to the custody of a law enforcement officer. The patient must be released within 48 hours of his admission except when the examining mental health professional concludes that there is reason to believe that the patient may require evaluation or treatment, in which case, unless the patient voluntarily gives express and informed consent to evaluation

or treatment, a proceeding for court-ordered evaluation or involuntary placement shall be initiated.

(2) COURT-ORDERED EVALUATION.

(a) Criteria. A person may be admitted to, or retained in, a receiving facility for evaluation if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injure himself or others if allowed to remain at liberty; or
2. In the need of care or treatment which, if not provided, may result in neglect or refusal to care for himself and that such neglect or refusal poses a real and present threat of substantial harm to his well being.

(b) Initiation of proceeding. A court-ordered evaluation may be initiated as follows:



1. Any person may file with the court a petition, executed under oath and supported by affidavits of two additional persons, requesting an evaluation of a person located in the county who is alleged to meet the criteria for a court-ordered evaluation; or

2. Any person may file with the court a petition executed under oath alleging that a person in the county meets the criteria for a court-ordered evaluation. The petition must be accompanied by the certificate of a mental health professional stating that he has examined the patient within the preceeding 5 days and has found that the patient may be mentally ill and requires placement in a receiving facility for full evaluation.

(c) Notice; hearing on petition. The judge shall set a hearing on the petition and shall serve notice of the time and

place of such hearing on the patient, his guardian, if one has previously been appointed, and the person, if any, having custody and control of the patient. In the absence of a guardian, two other representatives for the service of the notice shall be designated by the court, one of whom, other than the person who filed the petition, shall be selected in the following order:

1. The patient's spouse;
2. An adult child;
3. Parent;
4. Adult next of kin;
5. Adult friend;
6. Appropriate human rights advocacy committee as defined in s. 20.19; or
7. The department.

The second representative shall be selected from the above list without regard to the



order of listing, except that the department shall only be selected as the representative in the last resort in cases where the patient is receiving services in a state-owned facility. The court shall make such efforts, as in its discretion it determines reasonable in view of the emergency, to contact the persons listed above in the order listed. The court shall notify any other person, including any persons whose names appear in the patient's court file, that the judge believes has a concern for the patient's welfare. The hearing shall be set within 5 days of the date of mailing the notice with a copy of the petition attached. The court shall grant a continuance upon application by the patient, his guardian, or a representative if such continuance is found necessary to permit preparation for the hearing. The hearing may be waived in writing by the

patient. The patient and his guardian or representatives shall be informed of the right to counsel by the judge, and, if the patient cannot afford an attorney to represent him at the hearing, the judge shall appoint one. The patient shall be consulted with regard to the appointment of a representative and have authority to request that an appointed representative be replaced.

(d) Order for evaluation. After a hearing or, if the hearing is waived by express and informed consent of the patient or his guardian, after a review of all evidence, if the judge is satisfied that immediate evaluation is necessary, he shall issue an order to any law enforcement officer, if other less restrictive means are not available, to deliver the patient to a receiving facility for evaluation. If the judge is satisfied that evaluation is

not necessary, but that the patient need not be retained in a receiving facility immediately for his own safety or that of others, he may order the patient to appear at a designated receiving facility at a specified time within 3 days. If the patient fails to appear at the specified time, the order of the court, countersigned by the administrator of the facility to show that the person did not appear as ordered, shall authorize and direct any law enforcement officer to take the person into custody and deliver him to the specified receiving facility.

(e) Evaluation by a receiving facility. A patient who is admitted to a receiving facility may be detained for a period not to exceed 5 days. The staff members of all receiving facilities shall encourage the patients to apply for voluntary placement if placement appears

necessary. Within the 5-day evaluating period one of the following actions shall be taken based on the individual needs of the patient:

1. The patient shall be released.
2. The patient shall be released for outpatient treatment by a community facility;
3. The patient shall give express and informed consent to placement as a voluntary patient; or
4. Proceedings for involuntary placement shall be initiated.

The least restrictive form of treatment shall be made available when determined by a receiving facility mental health professional to be necessary.

(3) DISCHARGE OF PATIENT. At any time the patient is found not to require retention in a receiving facility for



emergency treatment or evaluation, the receiving facility shall discharge the patient unless the patient is under criminal charges, in which case he shall be returned to the custody of a law enforcement officer. Notice of the discharge shall be given to the patient's guardian or representatives, to any mental health professional who executed a certificate admitting the patient to the receiving facility, and to any court which ordered the patient's evaluation.

FLORIDA STATUTES  
SECTION 394.465 (1981)

394.465 Voluntary admission.

(1) AUTHORITY TO RECEIVE PATIENTS.

(a) A facility may receive for observation, diagnosis, or treatment any individual 18 years of age or older making application by express and informed consent for admission or any individual age 17 or under for whom such application is made by his parent or guardian pursuant to s. 394.467. If found to show evidence of mental illness and to be suitable for treatment, such person 18 years of age or older may be admitted to the facility.

(b) A facility may admit for evaluation, diagnosis, or treatment any individual who makes application by express and informed consent therefor; however, any individual age 17 or under may be admitted only after a hearing to verify the



voluntariness of the consent. If such individual is under 18 years of age, his parent or guardian may apply for his discharge, and the administrator shall release the patient within 3 days of such application for discharge.

(2) RIGHT OF VOLUNTARY PATIENTS TO DISCHARGE.

(a) A facility shall discharge a voluntary patient who has sufficiently improved so that retention in the facility is no longer desirable. A patient may also be discharged to the care of a community facility. A voluntary patient or his guardian, representative, or attorney may request discharge in writing at any time following the admission to the facility. This request may be submitted to a member of the staff of the facility for transmittal to the administrator. If the patient, or another on his behalf, makes an

oral request for release to a staff member, such request shall be immediately entered in the patient's clinical record, and the patient must within 8 hours be given counseling and assistance in preparing a written request. If a written request is submitted to a staff member, it shall be delivered to the administrator within 16 hours. Within 3 days of delivery of a written request for release to the administrator, the patient must be discharged from the facility or a plan instituted for a discharge of the patient. Such plan shall be approved by the patient. If the administrator determines that the patient meets the criteria for involuntary placement, proceedings for involuntary placement must be initiated within 3 days of delivery of the written request, exclusive of weekends and holidays. If the patient was admitted

on his own application and the request for discharge is made by a person other than the patient, the discharge may be conditioned upon the express and informed consent of the patient. If the patient is under the age of 18, his parent or guardian may act for him.

(b) If the administrator, upon the advice of the patient's attending mental health professional, determines that the patient needs to be transferred to a long-term treatment facility and the patient refuses to go as a voluntary patient, the administrator shall be authorized to file a petition for involuntary placement.

(3) NOTICE OF RIGHT TO RELEASE. At the time of his admission and each 6 months thereafter, a voluntary patient and his guardian or representatives shall be notified in writing of his right to apply for a discharge.

(4) TRANSFER TO VOLUNTARY STATUS.

Staff members of all treatment facilities shall encourage an involuntary patient to give express and informed consent to transfer to voluntary status unless the patient is under criminal charges, or unless the patient is unable to understand the nature of voluntary placement, or unless voluntary placement would be harmful to the patient, in which case a finding to this effect shall be entered in the patient's clinical record. Any involuntary patient who applies shall be transferred to voluntary status immediately, unless such transfer would not be in the best interest of the patient, in which case such finding shall be entered in the patient's clinical record and shall be subject to review every 90 days. When transfer to voluntary status occurs, notice shall be given the patient and his guardian or representatives and, if



the patient is involuntarily placed under an order of court, to the court which entered such order.

(5) **TRANSFER TO INVOLUNTARY STATUS.** A patient who has given express and informed consent to be hospitalized as a voluntary patient and, upon arrival at the treatment facility, refuses to remain as a voluntary patient may be detained by the treatment facility for a period not to exceed 3 days while the administrator of the treatment facility initiates procedures for involuntary placement.

**FLORIDA STATUTES  
SECTION 394.467 (1981)**

**394.467 Involuntary placement.**

**(1) CRITERIA.**

(a) A person who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily hospitalized pursuant to such finding if he is mentally ill and, because of his illness, is manifestly dangerous to himself or others.

(b) Any other person may be involuntarily placed if he is mentally ill and, because of his illness, is:

1. Likely to injure himself or others if allowed to remain at liberty, or
2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present



threat of substantial harm to his well-being.

(2) ADMISSION TO A TREATMENT FACILITY.

A patient may be involuntarily placed in a treatment facility, after notice and hearing, upon recommendation of the administrator of a receiving facility where the patient has been admitted for examination or evaluation. When a patient is not an inpatient in a receiving facility, the administrator of a designated receiving facility may make a recommendation for involuntary placement of a patient who has been given an examination, evaluation, or treatment by staff of the receiving facility or a private mental health professional. The hearing may be waived by express and informed consent in writing by the patient. The recommendation must be supported by the opinions of two mental health professionals, at least one of whom

shall be a physician, who have personally examined the patient within the proceeding 5 days that the criteria for involuntary placement are met. Such recommendation shall be entered on an involuntary placement certificate, which certificate shall authorize the receiving facility to retain the patient pending transfer to a treatment facility or completion of a hearing. The certificate shall be filed with the court in the county where the patient is located and shall serve as a petition for a hearing regarding involuntary placement. A copy of the certificate shall also be filed with the department, and copies shall be served on the patient and his guardian or representatives, accompanied by:

(a) A written notice, in plain and simple language, that the patient or his guardian or representative may apply at any time for a hearing on the issue of the

patient's need for involuntary placement if he has previously waived such a hearing.

(b) A petition for such hearing, which requires only the signature of the patient or his guardian or representative for completion.

(c) A written notice that the petition may be filed with a court in the county in which the patient is hospitalized at the time of the certificate is executed and the name and address of the judge of such court.

(d) A written notice that the patient or guardian or representative may apply immediately to the court to have an attorney appointed if the patient cannot afford one.

The petition may be filed in the county in which the patient is involuntarily placed at any time within 6 months of the date of the certificate. The hearing shall

be held in the same county, and one of the patient's physicians at the facility shall appear as a witness at the hearing. If the hearing is waived, the court shall order the patient to be transferred to the least restrictive type of treatment facility based on the individual needs of the patient, or, if he is at a treatment facility, that he be retained there. However, the patient can be immediately transferred to the treatment facility by waiving his hearing without the court order. The involuntary placement certificate shall serve as authorization for the patient to be transferred to a treatment facility and as authorization for the treatment facility to admit the patient. The treatment facility may retain a patient for a period not to exceed 6 months from the date of admission. If continued involuntary placement is necessary at the end of that



period, the administrator shall apply to the hearing examiner for an order authorizing continued involuntary placement.

(3) PROCEDURE FOR HEARING ON INVOLUNTARY PLACEMENT.

(a) If the patient does not waive a hearing or if the patient, his guardian, or a representative files a petition for a hearing after having waived it, the judge shall serve notice on the administrator of the facility in which the patient is placed and on the patient. The notice of hearing must specify the date, time, and place of hearing; the basis for detention; and the names of examining mental health professionals and other persons testifying in support of continued detention and the substance of their testimony. The judge shall serve notice on the state attorney of the judicial circuit of the county in which

the patient is placed, who shall represent the state. The court shall hold the hearing within 5 days unless a continuance is granted. The patient, his guardian or representative, or the administrator may apply for a change of venue for the convenience of parties or witnesses or because of the condition of the patient. Venue may be ordered changed within the discretion of the court. The patient and his guardian or representative shall be informed of the right to counsel by the court. If the patient cannot afford an attorney, the court shall appoint one. The patient's counsel shall have access to facility records and to facility personnel in defending the patient. One of the mental health professionals who executed the involuntary placement certificate shall be a witness. The patient and his guardian or representative shall be informed by the



judge of the right to an independent expert examination by a mental health professional. If the patient cannot afford a mental health professional, the judge shall appoint one. If the court concludes that the patient meets criteria for involuntary placement, the judge shall order that the patient be transferred to a treatment facility or, if the patient is at a treatment facility, that he be retained there or that he be treated at any other appropriate facility or service on an involuntary basis. The judge shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the judge finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate who shall act on the patient's behalf relating to the provision of express and informed consent to treatment. The order shall adequately

document the nature and extent of the patient's illness. The judge may adjudicate a person incompetent pursuant to the provisions of this act at the hearing on involuntary placement. The treatment facility may accept or retain a patient admitted involuntarily for a period not to exceed 6 months whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness. Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient. If further involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued involuntary placement.

(b) The court shall provide a court order, a psychiatric evaluation, and other adequate documentation of each patient's

mental illness to the administrator of a treatment facility whenever a patient is ordered for involuntary placement, whether by civil or criminal court. The administrator of a treatment facility may refuse admission to any patient directed to its facility on an involuntary basis, whether by civil or criminal court order, who is not accompanied at the same time by adequate orders and documentation.

**(4) PROCEDURE FOR CONTINUED INVOLUNTARY PLACEMENT.**

(a) If continued placement of an involuntary patient is necessary, the administrator shall, prior to the expiration of the period during which the treatment facility is authorized to retain the patient, request an order authorizing continued involuntary placement. This request shall be accompanied by a statement from the patient's mental health profes-

sional justifying the request and a brief summary of the patient's treatment during the time he was involuntarily placed. In addition, the administrator shall submit an individualized plan for the patient for whom it is requesting continued involuntary placement. Notification of this request for retention shall be mailed to the patient and his guardian or representative along with a completed petition, requiring only a signature, for a hearing regarding the continued hospitalization and a waiver-of-hearing form. The waiver-of-hearing form shall require express and informed consent and shall state that the patient is entitled to a hearing under the law; that he is entitled to be represented by an attorney at the hearing and, if he cannot afford an attorney, that one will be appointed; and that, if it is shown at the hearing that the patient does not meet the



criteria for involuntary placement, he is entitled to be released. If the patient or his guardian or representative does not sign the petition, or if the patient does not sign a waiver within 15 days, the hearing officer shall notice hearing with regard to the patient involved in accordance with s. 120.57(1).

(b) Any time continued involuntary placement is requested, the hearing officer may, on his own motion, notice a hearing.

(c) Any time continued involuntary placement is requested by the administrator, the administrator may request a hearing, and the hearing officer shall hold hearing within 30 days of such request.

(d) The administrator shall not transfer any patient to voluntary status when he has reasonable cause to believe that the patient is dangerous to himself or others. In any case in which the admini-

strator has reasonable cause to believe that an involuntary patient is dangerous to himself or others, the administrator shall request continued involuntary placement. In any case in which a request for continued involuntary placement is necessary, but the administrator after reviewing the case believes there is not reasonable cause to believe that the patient meets the criteria for involuntary placement at the time of application for transfer to voluntary status, and the patient needs continued placement, the patient shall be transferred to a voluntary basis.

(e) If the patient or his guardian or representative returns the signed petition noted in paragraph (a), the hearing officer shall notice a hearing in accordance with s. 120.57(1). The patient and his guardian or representative shall be informed of the right to counsel by the hearing officer.



In the event a patient cannot afford counsel in a hearing before a hearing officer, the public defender in the county where the hearing is to be held shall act as attorney for the patient. The hearing shall be conducted in accordance with chapter 120.

(f) If the patient by express and informed consent waives his hearing or if at a hearing it is shown that the patient continues to meet the criteria for involuntary placement, the hearing officer shall sign the order for continued involuntary placement. The treatment facility shall be authorized to retain the patient for a period not to exceed 1 year. The same procedure shall be repeated prior to the expiration of each additional 1-year period the patient is retained.

(g) If continued involuntary placement is necessary for an individual admitted

while serving a criminal sentence, but whose sentence is about to expire, or for an individual involuntarily placed while a minor, but who is about to reach the age of 18, the administrator shall petition the hearing officer for an order authorizing continued involuntary placement.

(h) At any hearing hereunder, the hearing examiner shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the hearing examiner finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate who shall act on the patient's behalf relating to the provision of express and informed consent to treatment. If the hearing examiner finds the patient is competent to consent to treatment, then the patient's competence

shall be restored, and the guardian advocate previously appointed shall be discharged.

FLORIDA STATUTES  
SECTION 768.28 (1981)

**768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.**

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivision to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency

or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

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(9)(a) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent of the state or its subdivisions shall be considered an adverse witness in a tort action for injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damages suffered as a result of any act, event, or omission of an officer, employee, or agent of the



state or any of its subdivisions or constitutional officers shall be action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(11) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

DARRELL BURCH,

Plaintiff,

vs.

Case No. 85-7081-MP

APALACHEE COMMUNITY  
MENTAL HEALTH SERVICES,  
INC., a Florida corporation  
not for profit; LEON COUNTY  
DEPUTY SHERIFF F.P.; MARLUS  
C. ZINERMON, M.D.; ROBERT B.  
WILLIAMS, JANET V. POTTER,  
MARJORIE R. PARKER; JAMES J.  
SWEET; MARY SUE MCCORMICK;  
KISHORCHANDRA PANDYA, M.D.;  
PETER K. CHOU, M.D.; GROVER  
HARRISON; ELOUISE DANIEL; and  
MARTHA C. STEPHENS,

Defendants.

COMPLAINT

Plaintiff, DARRELL BURCH, by and  
through his undersigned attorney, sues  
Defendants, APALACHEE COMMUNITY MENTAL  
HEALTH SERVICES, INC., a Florida corpor-  
ation not for profit; LEON COUNTY DEPUTY  
SHERIFF F.P.; MARLUS C. ZINERMON, M.D.;

ROBERT B. WILLIAMS; JANET V. POTTER;  
MARJORIE R. PARKER; JAMES J. SWEET; MARY  
SUE MCCORMICK; KISHORCHANDRA PANDYA, M.D.;  
PETER K. CHOU, M.D.; GROVER HARRISON;  
ELOUISE DANIEL; and MARTHA C. STEPHENS and  
alleges:

1. This action arises under the Four-  
teenth Amendment to the Constitution of the  
United States and under U.S.C., Title 42, §  
1983, as hereinafter more fully appears.

2. This Court has jurisdiction of this  
cause under and by virtue of U.S.C., Title  
28, §1343.

3. Plaintiff, DARRELL BURCH, is a  
citizen of the United States and a resident  
of the City of Gibsonton, County of Hills-  
borough, State of Florida.

COUNT I

4. Defendant APALACHEE COMMUNITY  
MENTAL HEALTH SERVICES, INC. (hereinafter  
ACMHS) is a private, non-profit corporation



whose corporate headquarters is in the City of Tallahassee, County of Leon, State of Florida. Defendant ACMHS is designated by the Florida Department of Health and Rehabilitative Services as an intake facility for the care of the mentally ill by the authority and under the directives of the Florida Mental Health Act, Chapter 394, Florida Statutes.

5. Each and all of the acts of Defendant ACMHS alleged herein were done by said Defendant under color and pretense of the statutes, ordinances, regulations, customs or usages of the State of Florida, specifically under the color and pretense of Chapter 394, Florida Statutes.

6. On December 7, 1981, Plaintiff was taken by a concerned citizen to Defendant ACMHS in Tallahassee, Florida. At that time and place, Defendant ACMHS admitted Plaintiff to its Project Path for emergency

examination. Defendant ACMHS required Plaintiff to sign voluntary admission and treatment forms. A copy of each of said forms is attached hereto and incorporated herein as composite Exhibit A.

7. Records of Defendant ACMHS indicate that at the time of admission Plaintiff was hallucinating and disoriented. A copy of said records is attached hereto and incorporated herein as composite Exhibit B.

8. Defendant ACMHS knew or should have known that at the time of admission Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment.

9. Defendant ACMHS confined and imprisoned Plaintiff against his will from December 7, 1981 to December 10, 1981. Without authorization from Plaintiff, Defendant ACMHS examined and treated him during the same period and administered



heavy medications to him with force and duress. Plaintiff was not represented by counsel and no hearing of any sort was held at which he could have challenged his involuntary commitment and treatment.

10. On December 10, 1981, Defendant ACMHS caused Plaintiff to be transferred against his will to Florida State Hospital at Chattahoochee, Florida (hereinafter FSH), as more fully appears in paragraph 17 hereinbelow. Defendant ACMHS on said date also required Plaintiff to sign a Request for Voluntary Admission form and an Authorization for Treatment form for admission and treatment at FSH, and a copy of each of said forms is attached hereto and incorporated herein as Exhibit C.

11. Records of Defendant ACMHS indicate that Plaintiff was heavily medicated, disoriented and paranoid on December 10, 1981, when he was transferred from ACMHS to

FSH. A copy of said record is attached hereto and incorporated herein as Exhibit D.

12. Defendant ACMHS knew or should have known that at the time of Plaintiff's transfer to FSH Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission at FSH. Plaintiff was not represented by counsel and no hearing of any sort was held at which he could have challenged his involuntary transfer and commitment to FSH.

13. Defendant ACMHS deprived Plaintiff of his liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution. Defendant ACMHS acted with willful, wanton and reckless disregard of and indifference to Plaintiff's Constitutionally guaranteed right to due process of law. Plaintiff has been and continues to be substantially

damaged by the aforescribed acts of Defendant ACMHS.

COUNT II

14. Plaintiff realleges Paragraphs 1 through 13 hereinabove.

15. Defendant LEON COUNTY DEPUTY SHERIFF F.P. (hereinafter called F.P.) at all times material hereto was a duly appointed, employed and acting deputy sheriff of Leon County, a governmental subdivision of the State of Florida. Notwithstanding the directives of Chapter 394, Florida Statutes, no written and signed report was made of Defendant FP's activities which are the subject of this action which would disclose Defendant FP's full name.

16. Each and all of the acts by Defendant FP alleged herein were done by said Defendant under the color and pretense of the statutes, ordinances, regulations,

customs or usages of the State of Florida and the County of Leon, specifically under the color and pretense of Chapter 394, Florida Statutes, and the authority of the Office of Sheriff for said County.

17. On December 10, 1981, Defendant FP, as part of his regular and official employment as a deputy sheriff for Leon County, was dispatched to ACMHS pursuant to the request of ACMHS. Defendant FP arrived at ACMHS to effect the transport of Plaintiff to FSH.

18. Defendant FP knew that Plaintiff was to be transported to FSH solely upon the authority of Plaintiff's purported consent as is evidenced by Defendant FP's initials and remarks on the voluntary admission and treatment forms more fully described in Paragraph 10 hereinabove.

19. Defendant FP knew or should have known that Plaintiff was heavily medicated,



disoriented and paranoid at the time of transport to FSH and that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to the transfer and admission to FSH.

20. Defendant FP nonetheless seized Plaintiff and against Plaintiff's will imprisoned him and transported him to FSH for admission and treatment in a motor vehicle owned and maintained by Leon County for the use and benefit of this Sheriff's Office. Plaintiff was not represented by counsel and no hearing of any kind was held at which he could have challenged his involuntary transfer and commitment by Defendant FP to FSH.

21. Defendant FP deprived Plaintiff of his liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution. Defendant FP acted with willful, wanton and

reckless disregard of and indifference to Plaintiff's Constitutionally guaranteed right to due process of law. Plaintiff has been and continues to be substantially damaged by aforescribed acts of Defendant FP.

### COUNT III

22. Plaintiff realleges Paragraphs 1 through 21.

23. Defendants MARLUS C. ZINERMON, M.D.; ROBERT B. WILLIAMS; JANET V. POTTER; MARJORIE R. PARKER; JAMES J. SWEET; MARY SUE MCCORMICK; KISHORCHANDRA PANDYA, M.D.; PETER K. CHOU, M.D.; GROVER HARRISON; ELOUISE DANIEL; and MARTHA C. STEPHENS (hereinafter Defendants) at all times material hereto were employees of FSH, a hospital facility owned and operated by the State of Florida and designated by Chapter 394, Florida Statutes, as a treatment facility for the mentally ill.



24. Each and all of the acts of the Defendants alleged herein were done by Defendants, and each of them, under the color and pretense of the statutes, ordinances, regulations, customs or usages of the State of Florida and by and through the authority of their respective positions as employees at FSH, specifically under the color and pretense of Chapter 394, Florida Statutes.

25. On or about December 10, 1981 and December 11, 1981, Defendants, and each of them, as part of their regular and official employment at FSH, took part in admitting Plaintiff to FSH as a "voluntary" patient. Defendants' respective roles in the "voluntary" admission process are evidenced by admissions-related documents which are attached hereto and incorporated as composite Exhibit E.

26. Records of FSH indicate that upon admission on December 10, 1981, Plaintiff was "disoriented, semi-mute, confused, and bizarre in appearance and thought." Said records also indicate that Plaintiff was not cooperative in the initial interview and was heavily medicated at the time of admission. A copy of these records is attached hereto and incorporated as composite Exhibit F.

27. Defendants, and each of them, knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH. See Exhibit G attached hereto and incorporated herein. Nonetheless, Defendants, and each of them, seized Plaintiff and against Plaintiff's will confined and imprisoned him and subjected him to involuntary commitment and treatment for the period from December 10,

1981, to May 7, 1982. For said period of 149 days, Plaintiff was without the benefit of counsel and no hearing of any sort was held at which he could have challenged his involuntary admission and treatment at FSH.-

28. Defendants, and each of them, deprived Plaintiff of his liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution. Defendants acted with willful, wanton and reckless disregard of and indifference to Plaintiff's Constitutionally guaranteed right to due process of law. Plaintiff has been and continues to be substantially damaged by the aforescribed acts of Defendants.

WHEREFORE, Plaintiff demands judgment against each Defendant for damages, punitive damages, costs, reasonable attorney's fees, and such other and further relief as

this Court deems meet and just. Plaintiff further demands a trial by jury of all issues so triable.

DATED this 7th day of February, 1985.

/s/  
RICHARD M. POWERS

Richard M. Powers, P.A.  
850 Barnett Bank  
Building  
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Tallahassee, Florida  
32301  
(904) 224-5596

Attorney for Plaintiff

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

DARRELL BURCH,

Plaintiff,

vs.

Case No. 85-7081-MP

APALACHEE COMMUNITY MENTAL  
HEALTH SERVICES, INC., a  
Florida Corporation not for  
profit; LEON COUNTY DEPUTY  
SHERIFF F.P.; MARLUS C.  
ZINERMON, M.D.; ROBERT B.  
WILLIAMS; JANET V. POTTER;  
MARJORIE R. PARKER; JAMES J.  
SWEET; MARY SUE MCCORMICK;  
KISHORCHANDRA PANDYA, M.D.;  
PETER K. CHOU, M.D.; GROVER  
HARRISON; ELOUISE DANIEL; and  
MARTHA C. STEPHENS,

Defendants.

MOTION TO DISMISS

Defendants, Robert B. Williams, Janet  
V. Potter, Marjorie R. Parker, James J.  
Sweet, Mary Sue McCormick, Kishorchandra  
Pandya, M.D., Peter K. Chou, M.D., Grover  
Harrison, Eloise Daniel, and Martha C.  
Stephens, by and through the undersigned

attorney, pursuant to Rule 129b),  
Fed.R.Civ.P., move this Court to dismiss  
the Complaint in the above-styled cause on  
the ground that the allegations thereof  
fail to state a claim upon which relief can  
be granted and further, the allegations  
fail to establish jurisdiction of this  
Court over the subject matter. The grounds  
upon which this Motion is based are more  
fully explained in the Memorandum of Law  
that follows.

MEMORANDUM OF LAW

The allegations of the Complaint state  
that on December 7, 1981, Plaintiff was  
brought to Apalachee Community Mental  
Health Services, Inc., in Tallahassee,  
Florida, by a concerned citizen (not iden-  
tified in the Complaint) and there given  
treatment for three (3) days until December  
10 when he was transferred to Florida State  
Hospital in Chattahoochee for treatment.



The enclosures to the Complaint indicate that Plaintiff was wandering around a public thoroughfare or street. The essence of the Complaint is that Plaintiff signed a voluntary admission form and that he did not have mental capacity at that time to know the nature of his act. As a result, the claim is that Plaintiff was falsely imprisoned until sometime in early May the following year. The Complaint is silent as to the surroundings or the nature of the discharge of the Plaintiff from Florida State Hospital.

To this Complaint, a Motion to Dismiss has been filed on behalf of Apalachee Community Mental Health Services, Inc., wherein it stated that on the authority of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and Hudson v. Palmer, 468 U.S. \_\_\_\_\_, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), that a deprivation of

property without due process of law will not fall under 42 U.S.C. § 1983 where a full and adequate postdeprivation remedy is available to the Plaintiff under state law. Defendants, in this Motion, agree with the conclusions set forth in the Motion of Apalachee Community Mental Health Services, Inc., and would invite the attention of the Court to § 728.28, Fla. Stat. (1983), which sets forth the State's limited liability in tort and stress that a full and complete remedy is provided therein to this Plaintiff.

Paul v. Davis, 426 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), teaches that the Fourteenth Amendment is not a font for tort law to be superimposed upon whatever systems may already be administered by the states. This Complaint truly is no more than a tort action which should not fall within the parameters of 42 U.S.C. §

1983. In addition, the Court lacks subject matter jurisdiction on the basis of the Eleventh Amendment immunity available to the States. There can be no doubt from the allegations contained in paragraphs 23 and 24 of the Complaint that Defendants, in whose behalf this memorandum is submitted, that they were being sued in their official capacity. In paragraph 24, it is explicitly stated that their actions were done by and through the authority of their respective positions as the employees of Florida State Hospital. A recent case which explains sovereign immunity afforded by the Eleventh Amendment is Ostroff v. State of Florida, Dept. of Health and Rehabilitative Services, 554 F.Supp. 347 (M.D. Fla. 1983), where it is stated at pages 355 and 356:

The fact that the plaintiff in this case is arguably suing for civil rights violations does not

deprive the State of its Eleventh Amendment defense.

\* \* \*

Of course, a state may choose to waive Eleventh Amendment sovereign immunity. However, Edelman v. Jordan instructs that no waiver should be found unless clearly stated. 415 U.S. at 673, 94 S.Ct. at 1360; Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association, 450 U.S. at 150, 101 S.Ct. at 1034; Williams v. Bennett, 689 F.2d 1370, 1377 (11th Cir. 1982). Article X, Section 13 of the Florida Constitution provides that state sovereign immunity may be waived only by general law. This Court's review of the Florida Statutes reveals no such waiver with respect to civil rights liability. Florida has enacted a limited waiver of sovereign immunity for "actions . . . in tort," at § 768.28, Fla. Stat. While § 768.28 presumably would authorize an action for damages against the State brought in federal court under some traditional theory of tort liability, assuming the plaintiff could otherwise assert federal jurisdiction, see Kiesel v. State of Florida, Department of Natural Resources, 479 F.2d 1261 (5th Cir. 1973) (tort suit allowed in admiralty under pre-

decessor to § 768.28), nothing in the statute indicates that the term "tort action" was meant to encompass civil rights claims. There is obviously no necessary correlation between a tort cause of action and a civil rights cause of action; and even in cases where the two theories overlap, lawyers generally assert them as separate, distinct counts. Furthermore, in a related provision authorizing governmental payment of judgments against public employees, the Florida Legislature has expressly drawn a distinction, in maximum damages payable for satisfaction of a judgment, between tort actions arising under § 728.28 and civil rights actions arising under federal statutes such as 42 U.S.C. § 1983. §111.071(1)(a), Fla. Stat. Consequently, the Court is unable to conclude that § 768.28 was intended to authorize civil rights damages suits to be brought in federal court against the State of Florida.

Finally, state officers and employees are also immunized from suits for retrospective damages by the Eleventh Amendment where such damages would be paid from public funds in the state treasury. Edelman v. Jordan, 415 U.S. at 665, 94 S.Ct. at 1357; Williams v. Bennett, 689 F.2d at 1378-79;

American Civil Liberties Union v. Finch, 638 F.2d 1336 (5th Cir. 1978). Because the plaintiff concedes that he is suing the Secretary of H.R.S., Mr. David Pingree, vicariously in his official capacity (see "Rebuttal", filed March 29, 1982 at p.2), the Eleventh Amendment immunity enjoyed by the State of Florida and H.R.S. clearly extends to Mr. Pingree as well.

The Court concludes that it is without jurisdiction and the complaint must be dismissed. (Emphasis added).

Based upon the authorities cited above and those in the Memorandum of Law submitted on behalf of Defendant Apalachee Community Mental Health Center, this action should be dismissed. Plaintiff has an adequate post-deprivation remedy under state law and this Court lacks jurisdiction because of the Eleventh Amendment.

Respectfully submitted,

JIM SMITH  
Attorney General



/s/  
WALTER M. MEGINNISS  
Assistant  
Attorney General

DEPARTMENT OF  
LEGAL AFFAIRS  
The Capitol - Suite 1502  
Tallahassee,  
Florida 32301  
(904) 488-9935

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RICHARD M. POWERS, Esquire, 850 Barnett Bank Building, 315 South Calhoun Street, Tallahassee, Florida 31301, and ROBERT C. CRABTREE, Post Office Box 1739, Tallahassee, Florida 32302, this 29th day of March, 1985.

/s/  
WALTER M. MEGINNISS

**OPPOSITION**

**BRIEF**

2003 PAGE

NO. 87-1965

10

Supreme Court, U.S.  
**FILED**  
AUG 5 1988  
JOSEPH F. SPANGL, JR.  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

MARLUS C. ZINERMON, M.D. et al.,  
Petitioners,  
v.  
DARRELL BURCH,  
Respondent.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES  
COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

CERTIFICATE OF FILING  
AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Rule 28.2, Rules of the Supreme Court of the United States, that the original of the Respondent's Motion For Leave to Proceed In Forma Pauperis and Affidavit in Support Thereof, and the original of Respondent's Brief in Opposition to the Petition For Writ of Certiorari have been timely filed by depositing same in a United States post office or mailbox with first-class postage prepaid, properly addressed to the Clerk of this Court on August 5, 1988, which date is within the time permitted for the filing of same pursuant to the United States Supreme Court Chief Deputy Clerk's extension dated June 21, 1988 granting the Respondent through and including August 5, 1988 within which to file a Brief in Opposition to the Petition for Writ of Certiorari.

I HEREBY CERTIFY, pursuant to Rule 28.5, Rules of the Supreme Court of the United States, that a copy of Respondent's Motion For Leave to Proceed In Forma Pauperis and Affidavit in Support Thereof, and a copy of Respondent's Brief in Opposition to the Petition For Writ of Certiorari have been served on all parties required to be served by

187



depositing same in a United States post office or mailbox on August 5, 1988, with first-class postage prepaid, addressed to counsel of record for Petitioners, to-wit:

Robert A. Butterworth, Attorney General  
of Florida, by service on:

Louis F. Hubener, Assistant Attorney General  
Department of Legal Affairs  
The Capitol, Suite 1502  
Tallahassee, Florida 32399-1050

  
Richard M. Powers

RICHARD M. POWERS, P.A.  
701 Barnett Bank Building  
315 South Calhoun Street  
Tallahassee, Florida 32301  
Telephone: (904) 224-5596

Attorney for Respondent

SUBSCRIBED AND SWORN TO before me this 5th

day of August, 1988.



  
John L. Smith  
Notary Public

My commission expires:  
Notary Public, State of Florida  
My Commission Expires May 22, 1990

NO. 87-1965

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

MARLUS C. ZINERMON, M.D. et al.,  
Petitioners,

v.

DARRELL BURCH,  
Respondent.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

Richard M. Powers

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Counsel for Respondent

QUESTION PRESENTED

Whether Petitioners' "willful, wanton and reckless" confinement and treatment of Respondent without a hearing and without his informed consent constitutes a deprivation of Respondent's liberty without due process of law, actionable under 42 U.S.C. §1983.<sup>1</sup>

<sup>1</sup> The question presented in the Petition is argumentative in that it begs the questions of whether the acts of Petitioners were "random, unforeseeable and contrary to state law" and whether the State of Florida provides adequate post-deprivation remedies.

TABLE OF CONTENTS

	PAGE
Question Presented	1
Table of Contents	11
Table of Authorities	111
Statement of the Case	1
Reasons for Denying the Writ	3
Argument: I. THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. THE ELEVENTH CIRCUIT COURT OF APPEALS FOLLOWED AND DISTINGUISHED THIS COURT'S DECISIONS IN <u>PARRATT v. TAYLOR</u> AND ITS PROGENY.	4
II. THERE APPEARS TO EXIST SOME INCONSISTENCY IN THE DECISIONS AMONGST THE CIRCUITS IN BOTH THE ANALYSIS EMPLOYED AND THE RESULTS REACHED IN CASES INVOLVING INTENTIONAL DEPRIVATIONS OF BOTH PROPERTY AND LIBERTY INTERESTS. HOWEVER, THE APPARENT INCONSISTENCY RESULTS PRIMARILY FROM THE INTERPRETATION OF PRINCIPLES OF SUBSTANTIVE AND NOT PROCEDURAL DUE PROCESS.	7
III. THE ARGUMENT IN PART III OF THE PETITION IS ARGUMENT ON THE MERITS.	9
Conclusion	9
Respondent's Appendix	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Burch v. Apalachee Mental Health Services, Inc., 840 F.2d 797 (11th Cir. 1988)</u>	1, 5, 7, 8, 9
<u>Petner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987)</u>	4, 5, 6
<u>Maygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc) sent. denied, U.S. 92 L.Ed.2d 739, 106 S.Ct. 3333 (1986)</u>	8
<u>Molloway v. Walker, 784 F.2d 1287 (5th Cir. 1986)</u>	8
<u>Hudson v. Palmer, 469 U.S. 517, 104 S.Ct. 3192, 82 L.Ed.2d 893 (1984)</u>	4, 5, 8
<u>Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)</u>	5, 8
<u>Farratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)</u>	1, 3, 4, 5, 6, 7
<u>Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985) cert. denied, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986)</u>	4
<u>Shelton v. City of College Station, 754 F.2d 1251 (5th Cir. 1985), vacated and rev'd on other grounds, 780 F.2d 475 (5th Cir. 1986) (en banc)</u>	5
<u>Toney-El v. Fransen, 777 F.2d 1224 (7th Cir. 1985)</u>	8
<u>Vins v. Campbell County Fiscal Court, 820 F.2d 194 (6th Cir. 1987)</u>	8
 <u>STATUTES</u>	
§768.28, Fla. Stat. (1981)	1, 2
§768.28(9)(a), Fla. Stat. (1981)	2
§768.28(5), Fla. Stat. (1981)	2
§768.28(8), Fla. Stat. (1981)	2
 <u>OTHER</u>	
42 U.S.C. §1983	1, 9
Eighth Amendment, United States Constitution	9
Fourteenth Amendment, United States Constitution	8
Rule 17, Rules of the Supreme Court of the United States	9

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

MARLUS C. ZINERMON, F.D. et al.,  
Petitioners,

v.

DARRELL BURCH,  
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The plurality opinion of the court of appeals did not address the issue of the existence or adequacy of Florida's post-deprivation process. It was unnecessary for the court of appeals to reach that issue since it held that "Farratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and its progeny do not apply to Burch's allegations." Burch v. Apalachee Community Mental Health Services, Inc., 840 F.2d 797, 798 (11th Cir. 1988). The existence and adequacy of Florida's post-deprivation process in the form of its partial waiver of sovereign immunity in tort actions is, however, raised in the Petition and discussed first in Petitioners' statement of the case. Petitioners included part but not all of Florida's waiver of sovereign immunity statute, §768.28, Fla. Stat. (1981), in



their appendix. (P. App. at 185). The entire §768.28, Fla. Stat. (1981), is reproduced in Respondent's appendix. (R. App. 1).<sup>2</sup>

<sup>2</sup> §768.28(9)(a) provides in pertinent part that the "state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed . . . in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." (emphasis supplied) (R. App. 1). This language would seem to preclude an action by Burch against the state for the acts alleged in his complaint, in which case Florida provides no post-deprivation process in the form of a waiver of sovereign immunity in Burch's case or in any case involving a willful disregard of liberty or other rights. Furthermore, §768.28(5), Fla. Stat. (1981), limits tort damages against the state to \$100,000.00 and immunizes the state from liability for punitive damages and prejudgment interest. In addition, §768.28(8) provides: "No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." This subsection requires an attorney to accept cases on a contingent fee basis only and then limits the attorney's fees to 25% of a recovery by settlement or judgment. (R. App. 1).

#### REASONS FOR DENYING THE WRIT

The court of appeals did not either explicitly or implicitly draw a distinction between liberty interests and property interests in its application of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), to the facts of this case. Furthermore, such a distinction was not argued as a basis for decision by either the Respondent or the Petitioners. The court of appeals focused on the practicability of predeprivation process and found that Petitioners had state-clothed authority, were in a position to and had a duty to afford Respondent predeprivation process. The court of appeals concluded that Petitioners' acts were thus not "random and unauthorized" within the meaning of Parratt. In so holding, the court of appeals did not decide an important question of federal constitutional law previously undecided by this court.

Respondent acknowledges that there appears to exist inconsistency among some of the circuits in cases subsequent to Parratt involving intentional deprivations of both property and liberty rights by state actors. However, upon closer analysis, the inconsistencies appear to result primarily from diverse interpretations of the parameters of substantive due process. Since this case was decided on procedural due process grounds, this is not the appropriate case in which to clarify substantive due process issues. This court should not grant the Writ on the basis of the apparent inconsistencies in the substantive due process decisions of the various circuit courts of appeals.

ARGUMENT

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. THE ELEVENTH CIRCUIT COURT OF APPEALS FOLLOWED AND DISTINGUISHED THIS COURT'S DECISIONS IN PARRATT v. TAYLOR AND ITS PROGENY.

Petitioners' first argument in support of granting the Writ assumes that the court of appeals distinguished this case from Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and Hudson v. Palmer, 469 U.S. 517, 104 S.Ct. 3192, 82 L.Ed.2d 893 (1984), on the basis that the protected interest in this case is a liberty interest and not a property interest as was the case in both Parratt and Hudson. Not only did the court of appeals not so distinguish this case from Parratt and Hudson, such a distinction as a basis for decision was not presented or argued by Respondent and certainly not by Petitioners. The decision of the court of appeals was grounded on the practicability of predeprivation process and not on any distinction between liberty rights and property rights:

We do not share the district court's conclusion. Parratt does not apply to procedural due process violations when the state is in the position to provide predeprivation process.

As in Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987), the present case does not implicate Parratt. See also Patterson v. Coughlin, 761 F.2d 886, 892-93 (2d Cir. 1985), cert. denied, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986). In Fetner, the City Council possessed the authority to deprive Fetner of his property interest in continued employment. Similarly here, the state has clothed the appellees with the authority to deprive Burch of his liberty by enabling them to determine whether Burch had given his

voluntary, knowing, and express consent for admission. In contrast, in Parratt and similar cases, the defendants lacked state-clothed authority to deprive the plaintiffs of their protected property interests.

This Court recognized in Fetner that government officials abuse their state-clothed authority in depriving a person of a constitutionally protected interest when a predeprivation hearing is practicable. This conclusion is consistent with Parratt. As this Court recognized in Fetner, "[t]he touchstone in Parratt was the impracticability of holding a hearing prior to the claimed deprivation." [footnote omitted] 813 F.2d at 1185. Thus, "[p]ost-deprivation remedies do not provide due process if predeprivation remedies are practicable." Id. at 1186. In the present case, predeprivation procedures were practicable and thus postdeprivation remedies cannot provide due process.

Burch, 840 F.2d 797, 801.

There is no support for Petitioners' argument that this case was decided on a dichotomy between personal liberties and property rights.<sup>3</sup>

Petitioners also argue that the decision of the court of appeals holds that predeprivation process is necessary in every case when a state actor intentionally deprives a citizen of a protected interest when observance of state procedures would have prevented the deprivation. Petitioners contend that such a broad holding is contrary to Parratt and Hudson and not within the exception to Parratt announced in Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Petitioners' reading of the decision of the court of appeals is expansive.

<sup>3</sup> If a boundary between personal liberty rights and property rights is implicit in Parratt and Hudson, then this Court may wish to grant the Writ and survey that boundary. Such a boundary seemingly is recognized in at least one circuit. See Shelton v. City of College Station, 754 F.2d 1251 (5th Cir. 1985), vacated and rev'd on other grounds, 780 F.2d 475 (5th Cir. 1986) (en banc).



The decision of the court of appeals applied the rule in Parratt that predeprivation process must be impracticable before state post-deprivation process can suffice. The court of appeals held in this case that predeprivation process was not impracticable in that the state employees who were clothed with the authority and duty to provide a predeprivation hearing were the same employees who deprived Burch of his constitutional right to such a hearing and a judicial determination of his need for confinement and treatment. Petitioners' acts were not random and unauthorized within the meaning of Parratt:

The requirement of "impracticability" is coextensive with Parratt's requirement that the conduct be "random and unauthorized." We read Parratt and its progeny to define "random and unauthorized" conduct as conduct of a state actor who lacks the state-clothed authority to deprive persons of constitutionally protected interests. In contrast, the conduct complained of in the present case is not within the meaning of "random and unauthorized" as introduced by Parratt and refined by its progeny, but rather involves an abusive use of state-clothed authority.

Fetner teaches that a predeprivation hearing is practicable when officials have both the ability to predict that a hearing is required and the duty because of their state-clothed authority to provide a hearing. Similarly here, Burch has alleged that the appellees, who possessed state-clothed authority to deprive Burch of his liberty, abused that authority. A predeprivation hearing was practicable because the appellees had both the ability to predict that one was required and the duty because of their state-clothed authority to provide one. [footnote omitted]. Consequently, taking Burch's allegations as true, his procedural due process rights were violated after he was committed beyond forty-eight hours without a hearing.

Burch, at 801 n.9, 802.<sup>4</sup>

The court of appeals did not decide an important question of constitutional law as yet undecided by this Court. The decision of the court of appeals is but a principled application of the rule announced in Parratt and its progeny. On this basis, the Writ should be denied.

## II.

THERE APPEARS TO EXIST SOME INCONSISTENCY IN THE DECISIONS AMONGST THE CIRCUITS IN BOTH THE ANALYSIS EMPLOYED AND THE RESULTS REACHED IN CASES INVOLVING INTENTIONAL DEPRIVATIONS OF BOTH PROPERTY AND LIBERTY INTERESTS. HOWEVER, THE APPARENT INCONSISTENCY RESULTS PRIMARILY FROM THE INTERPRETATION OF PRINCIPLES OF SUBSTANTIVE AND NOT PROCEDURAL DUE PROCESS.

Without going to the merits of any of the cases cited in the Petition, Respondent acknowledges that the cited cases appear to reflect inconsistency amongst some of the circuits with respect to the application of Parratt.

<sup>4</sup> Petitioners acknowledge that the "state" must provide Burch with predeprivation process but argue that the "state" is relieved of such an obligation if the deprivation results from the act of "its errant agent". (Petition at 18-19). A question raised by Petitioners' argument is: "How many 'errant agents' are necessary to comprise the state?" Petitioners and ACMHS acted in union to deprive Burch of his liberty. Petitioners and ACMHS were not mere tortfeasors. Their ability to deprive Burch of his liberty resulted exclusively from their state-clothed authority. As indicated in the decision of the court of appeals, no private citizen could have had Burch confined and treated for 152 days. Burch, at 803 n.12. However, the argument of Petitioners suggests that Burch's constitutional right to a predeprivation hearing hinges on the number of state actors involved and not the nature of their acts. Clearly, the vast majority of actions of the "state" are taken not by official boards, committees, commissions, and the like but by the state's agents under the authority vested in them. It is equally as straightforward that the state's constitutional obligations are not satisfied by enacting laws which pass constitutional muster only to avoid their implementation.



Hudson and Logan to varying fact situations involving both property and liberty deprivations. At least some of the apparent inconsistency results from inconsistent interpretations of the parameters of substantive due process. For example, in Holloway v. Walker, 784 F.2d 1287 (5th Cir. 1986), the court held that the denial of a fair trial by a corrupt state court judge who conspired with some of the state court litigants constituted a procedural not a substantive due process violation without a federal remedy.<sup>5</sup> In contrast to Holloway, the court in Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 201 (6th Cir. 1987) found that when a Kentucky juvenile services probation officer, without authority and apparently out of spite, crossed state lines into Ohio and removed the plaintiff's children back to Kentucky, a substantive due process violation occurred from the "egregious abuse of governmental power." It is difficult to comprehend that the abuse of governmental power by a corrupt judge is less egregious or oppressive than the abuse by a spiteful probation officer.

In Toney-El v. Franzen, 777 F.2d 1224, 1227 (7th Cir. 1985), the court relied on the Bill of Rights to interpret the substantive component of the Fourteenth Amendment's due process clause. In Toney-El, a prisoner had been confined 306 days beyond his release date. Because the court found no specific constitutional right in the Bill of Rights to an early release from prison, no substantive due process violation was found. But see Haygood v. Younger, 769 F.2d 1350, 1355 (9th Cir. 1985) (en banc) (detention of

<sup>5</sup> Under the procedural due process analysis in Burch, Holloway is a case in which the deprivation by the state court judge was not random and unauthorized in that the judge was in a position to and had a duty to ensure a fair trial and a fair trial was not impracticable.

prisoner by state beyond his release date constituted cruel and unusual punishment in violation of Eighth Amendment and §1983 action lies).

The Burch case was decided on procedural due process grounds. Much of the apparent inconsistency in the decisional law results from interpretation of substantive due process principles. Notwithstanding the apparent inconsistency reflected in the substantive due process cases, this Court should deny the Writ in this procedural due process case.

### III.

THE ARGUMENT IN PART III OF THE PETITION  
IS ARGUMENT ON THE MERITS.

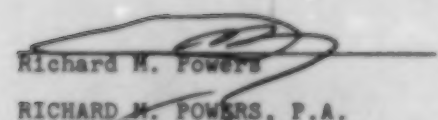
The argument presented in part III of the Petition is argument on the merits in its entirety and adds nothing to Petitioners' reasons for granting the Writ. Respondent respectfully defers his response to this part of Petitioners' argument until argument on the merits, if the Writ is allowed. Rule 17, Rules of the Supreme Court of the United States.

### CONCLUSION

The Petition For Writ of Certiorari should be denied.

DATED this 5th day of August, 1988.

Respectfully submitted,

  
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Counsel for Respondent

RESPONDENT'S APPENDIX

**766.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.—**

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

(3) Except for a municipality, the affected agency or subdivision may, at its discretion, request the assistance of the Department of Insurance in the consideration, adjustment, and settlement of any claim under this act.

(4) Subject to the provisions of this section, any state agency or subdivision of the state shall have the right of appealing any award, compromise, settlement, or determination to the court of appropriate jurisdiction.

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$300,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to \$100,000 or \$300,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.

The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974.

(6) An action shall not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing. The failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted by counterclaim pursuant to s. 766.14.

(7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality, upon the Department of Insurance, and the department or the agency concerned shall have 30 days within which to plead thereto.

(8) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.

(9)(a) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent of the state or its subdivisions shall be considered an adverse party in a tort action for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damages suffered as a result of any act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(b) As used in this subsection, the term "employee" includes any volunteer firefighter.

(10) Laws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act.

(11) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues.

(12) No action may be brought against the state or any of its agencies or subdivisions by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of such riot, unlawful assembly, public demonstration, mob violence, or civil disobedience. Nothing in this act shall abridge traditional immunities pertaining to statements made in court.

(13) The state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section. Agencies or subdivisions, and sheriffs for the purpose of police professional liability only, which are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding. Sheriffs may join together as self-insurers to provide coverage for police professional liability claims only.

(14) This section, as amended by ch. 81-317, Laws of Florida, shall apply only to causes of actions which accrue on or after October 1, 1981.

History.—s. 1, ch. 73-215, s. 1, ch. 74-285, s. 1, s. 2, ch. 77-28, s. 2, ch. 78-130, s. 1, ch. 79-255, s. 1, ch. 79-255, s. 1, ch. 80-271, s. 1, s. 2, ch. 80-271.



**REPLY**

**BRIEF**

AUG 19 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

③  
NO. 87-1965

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

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MARCUS C. ZINERMON, M.D., et al.,

Petitioners,

v.

DARRELL BURCH,

Respondent.

ON PETITION FOR CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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PETITIONERS' REPLY BRIEF

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# TABLE OF CONTENTS

<u>CASES</u>	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY TO RESPONDENT'S ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT	1
I. AN INTENTIONAL DEPRIVATION OF A LIBERTY INTEREST SHOULD BE ANALYZED ACCORDING TO THE PRINCIPLES ARTICULATED IN <u>PARRATT v. TAYLOR</u> , 451 U.S. 527 (1981), AND <u>HUDSON v. PALMER</u> , 468 U.S. 517 (1984).	1
II. THERE IS CLEAR CONFLICT AMONG THE CIRCUITS IN THEIR ANALYSIS OF PROCEDURAL DUE PROCESS REQUIREMENTS WHEN STATE AGENTS HAVE ALLEGEDLY DEPRIVED A PERSON OF A LIBERTY INTEREST BY FAILING TO FOLLOW STATE LAW OR PROCEDURES.	8
CONCLUSION	10



TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO RESPONDENT'S ARGUMENT IN OPPOSITION TO WRIT FOR GRANTING THE WRIT

1. AN INTENTIONAL DEPRIVATION OF A LIBERTY INTEREST SHOULD BE ANALYZED ACCORDING TO THE PRINCIPLES ARTICULATED IN PARRATT v. TAYLOR, 451 U.S. 527 (1981), AND HUDSON v. PALMER, 468 U.S. 517 (1984).

II. THERE IS CLEAR EVIDENCE SHOWING THE CIRCUITS IN THEIR ANALYSIS OF PROCEDURAL DUE PROCESS REQUIREMENTS WHEN STATE AGENTS HAVE ALLEGEDLY DEPRIVED A PERSON OF A LIBERTY INTEREST BY FAILING TO FOLLOW STATE LAW OR PROCEDURES.

CONCLUSION

TABLE OF AUTHORITIES

CASES

PAGE(S)

Burch v. Apalachee Community Mental Health Services, Inc.,  
840 F.2d 797, 801 (11th Cir. 1988)

2, 4, 10

Petner v. City of Roanoke,  
813 F.2d 1183 (11th Cir. 1987)

2, 4, 5

Haygood v. Younger,  
769 F.2d 1350 (9th Cir. 1985), cert. denied  
U.S. \_\_\_, 106 S.Ct. 3333 (1986)

9

Holloway v. Walker,  
784 F.2d 1287 (5th Cir. 1986), cert. denied  
U.S. \_\_\_, 107 S.Ct. 571 (1986)

9

Hudson v. Palmer,  
468 U.S. 517 (1984)

passim

Ingraham v. Wright,  
430 U.S. 651, 677, 683 (1977)

6, 7

Parratt v. Taylor,  
451 U.S. 527 (1981)

passim

Patterson v. Coughlin,  
761 F.2d 886 (2d Cir. 1985), cert. denied  
474 U.S. 1100 (1986)

9, 10

TABLE OF AUTHORITIES

PAGE(S)

CASES

Butch v. Appalachian Community Mental Health Services, Inc.  
440 F.2d 177, 801 (11th Cir. 1988)

Petner v. City of Norfolk  
817 F.2d 1183 (11th Cir. 1987)

Haywood v. Younger  
785 F.2d 1370 (9th Cir. 1985), cert. denied  
U.S. \_\_\_, 106 S.Ct. 3333 (1986)

Holloway v. Walker  
784 F.2d 1287 (5th Cir. 1986), cert. denied  
U.S. \_\_\_, 107 S.Ct. 571 (1986)

Hudson v. Palmer  
488 U.S. 217 (1984)

Ingram v. Wright  
450 U.S. 851, 877, 681 (1977)

Parrott v. Taylor  
451 U.S. 527 (1981)

Paterson v. Couchlin  
781 F.2d 888 (3d Cir. 1985), cert. denied  
474 U.S. 1100 (1985)

Toney-El v. Franzen,  
777 F.2d 1224 (7th Cir. (1985), cert. denied  
476 U.S. 1178 (1986) 9

Vinson v. Campbell County Fiscal Court, 820 F.2d 174, 179 (6th Cir. 1987) 9

Wadhams v. Proconier,  
772 F.2d 75 (4th Cir. 1985) 9

OTHERS

42 U.S.C. §1983 1

REPLY TO RESPONDENT'S ARGUMENT  
IN OPPOSITION TO REASONS FOR  
GRANTING THE WRIT.

I. AN INTENTIONAL DEPRIVATION OF  
A LIBERTY INTEREST SHOULD BE  
ANALYZED ACCORDING TO THE  
PRINCIPLES ARTICULATED IN  
PARRATT v. TAYLOR, 451 U.S.  
527 (1981), AND HUDSON v.  
PALMER, 468 U.S. 517 (1984).

In Point I of his brief in  
opposition, Burch contends that part of  
petitioners' argument is misconceived in  
that the Eleventh Circuit Court of  
Appeals did not distinguish its decision  
from Parratt v. Taylor, 451 U.S. 527  
(1981), and Hudson v. Palmer, 468 U.S.  
517 (1984), on the basis that a liberty  
interest was involved rather than a  
property interest. While it is true that  
the en banc majority decision did not  
explicitly make this distinction, it  
seems implicit in the holding that Burch  
stated a claim for relief under 42 U.S.C.  
§1983 for his alleged detention.



Contrary to what is suggested in the brief in opposition, petitioners argued vigorously below that the fact that a liberty interest was involved did not dictate a due process analysis different from that set down in Parratt and Hudson, supra.

Burch quotes the portion of the en banc decision which relies on the Eleventh Circuit's earlier decision in Petner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987), to distinguish this case from Parratt and Hudson, supra. See Burch v. Apalachee Community Mental Health Services, Inc., 840 F.2d 797, 801 (11th Cir. 1988) (en banc) and Brief in Opposition at 4, 5. The decision suggests that the state actors in Parratt and Hudson "lacked authority" to deprive inmates of their property interests while the Florida State Hospital employees here

had authority to deprive Burch of his liberty. This Court's opinion in Parratt, however, was at pains to note that "[t]he deprivation [of the prisoner's hobby kit] occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." 451 U.S. at 543. Assuming Burch was not competent to consent to treatment, the Florida State Hospital employees may similarly have failed in this case to follow state law requiring a commitment hearing for Burch. If "the controlling inquiry is solely whether the State is in a position to provide for predeprivation process" in such circumstances, as this Court stated in Hudson, supra, at 534, the State of Florida's position with respect to its hospital employees is no different from the position of the states in Parratt and

Hudson when their agents, without authority, deprived inmates of property interests. Florida was not in a position to prevent the random and unauthorized disregard of state law by its agents, assuming that such actions occurred as alleged.

The inquiry then becomes whether Florida's tort claim procedures provide all the process that Burch is due. The refusal to undertake this inquiry suggests a particular concern for liberty interests which, though not articulated in the majority opinion, is clearly evident in the concurring opinion of Judge Johnson and four other judges. See Burch, supra, at 803, Johnson, J., concurring.<sup>1</sup> Fetner, supra, does not

<sup>1</sup>Judge Johnson also wrote the majority opinion.

justify this refusal. In Fetner, a city employee sued under §1983 alleging that he had been deprived of his position as police chief without a due process hearing. The Eleventh Circuit did not find Parratt controlling because the due process deprivation was the "conscious and deliberate act of the City's highest governing board." 813 F.2d at 1185. Therefore, unlike Parratt, it was not impracticable for the highest authority to hold a predeprivation hearing. Id. at 1185-1186. The majority opinion in Burch wrongly assumes that the employees of Florida State Hospital are not like the prison officers in Parratt and Hudson but more closely correspond to the highest governing board of a city, as in Fetner. Thus, as stated in the petition for certiorari, the analysis accorded Burch's liberty interest is not



consistent with this Court's analysis of property interests set forth in Parratt and Hudson.

Although this apparent dichotomy should be examined by this Court, the question presented and addressed in the petition for certiorari was not solely whether such a distinction, if made, was constitutional, proper, but whether the allegations of Burch's complaint stated any claim for relief under §1983. (Petition at 13). It is that question which merits the grant of the Writ.

Burch also obliquely questions the adequacy of Florida's tort remedies (Brief in Opposition at 2, n. 1), although the panel decision below found them adequate. (A 128 et seq.) These state tort remedies are clearly a matter for consideration if the Court grants certiorari. See Ingraham v. Wright, 430

U.S. 651, 677, 683 (1977). In Ingraham, this Court rejected the contention that corporal punishment in Florida's public schools, which was administered without notice and opportunity to be heard, violated procedural due process requirements. This Court specifically found Florida's postdeprivation remedies adequate and hence held they satisfied the Fourteenth Amendment requirement of procedural due process. Id. at 683. According to Ingraham v. Wright, examination of a state's postdeprivation remedies is appropriate when a liberty interest has been infringed. Parratt, supra, specifically relied on Ingraham v. Wright in its analysis of due process requirements. Parratt, 451 U.S. at 542.

*E.g.,* Younger v. Younger, 769 F.2d 1350 (9th Cir. 1985), cert. denied, 105 S.Ct. 1333 (1985), and Holloway v. Walker, 784 F.2d 1287 (9th Cir. 1986), cert. denied, 107 S.Ct. 171 (1986).



II. THERE IS CLEAR CONFLICT AMONG THE CIRCUITS IN THEIR ANALYSIS OF PROCEDURAL DUE PROCESS REQUIREMENTS WHEN STATE AGENTS HAVE ALLEGEDLY DEPRIVED A PERSON OF A LIBERTY INTEREST BY FAILING TO FOLLOW STATE LAW OR PROCEDURES.

Burch's brief in opposition suggests that the inconsistencies in the decisions of the several circuits "result from interpretation of substantive due process principles." (Brief in Opposition at 9). To the contrary, the cases discussed in Point II of the petition for certiorari were cited for the disparate analysis accorded claims based on denial of procedural due process. Although some of the cases also involved a claim of denial of substantive

due process,<sup>2</sup> it is clearly the analysis of procedural due process requirements that is in conflict among the circuits. Compare Vinson v. Campbell County Fiscal Court, 820 F.2d 174, 179 (6th Cir. 1987), Holloway v. Walker, 784 F.2d 1287 (5th Cir. 1986), cert. denied \_\_\_ U.S. \_\_\_, 107 S.Ct. 571 (1986), Toney-El v. Franzen, 777 F.2d 1224 (7th Cir. 1985), cert. denied 476 U.S. 1178 (1986), and Wadhams v. Procnier, 772 F.2d 75 (4th Cir. 1985), with Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985), cert. denied \_\_\_ U.S. \_\_\_, 106 S.Ct. 3333 (1986), Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985), cert. denied 474 U.S.

<sup>2</sup>E.g., Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985), cert. denied U.S. \_\_\_, 106 S.Ct. 3333 (1986), and Holloway v. Walker, 784 F.2d 1287 (5th Cir. 1986), cert. denied \_\_\_ U.S. \_\_\_, 107 S.Ct. 571 (1986).

1100 (1986), and the en banc decision below at 840 F.2d 797 (11th Cir. 1988). It is this conflict in procedural due process analysis which should be resolved.

#### CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# **PETITIONER'S BRIEF**



NO. 87-1965

Supreme Court, U.S.  
FILED

MAY 4 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

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IN THE SUPREME COURT OF THE  
UNITED STATES  
OCTOBER TERM, 1988

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MARLUS C. ZINERMON, M.D., et al.,

Petitioners,

v.

DARRELL BURCH,

Respondent.

---

On Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

---

BRIEF FOR PETITIONERS

---

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1987/2

QUESTION PRESENTED

Whether the alleged "willful, wanton and reckless" detention of a mentally disturbed person for purposes of treatment without a hearing states a claim for denial of procedural due process under 42 U.S.C. §1983, where the due process deprivation was random, unforeseeable and contrary to state law, and where state law provides adequate postdeprivation remedies.

## PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the United States Court of Appeals for the Eleventh Circuit who are petitioners or respondents before this Court:

### Petitioners:

Marlus C. Zinermon, M.D.  
Robert B. Williams  
Janet V. Potter  
Marjorie R. Parker  
James J. Sweet  
Mary Sue McCormick  
Kishorchandra Pandya, M.D.  
Peter K. Chou, M.D.  
Grover Harrison  
Elouise Daniel  
Martha C. Stephens

All of the above named individuals were employees of the Florida State Hospital.

### Respondent:

Darrell Burch

Apalachee Community Mental Health Service, Inc., a defendant in the trial court and appellee before the Court of Appeals, is not a party to this proceeding.

## TABLE OF CONTENTS

### Page No.

Table of Authorities .....	v
Opinions Below .....	1
Jurisdiction .....	2
Constitutional Provisions and Statutes Involved.....	2
Statement of the Case .....	3
Summary of Argument .....	23
Argument	
Introduction.....	29
I. The Eleventh Circuit Court of Appeals Adopted an Incorrect Procedural Due Process Analysis and Failed to Balance Individual and State Interests In Deciding What Process Was Due Respondent Burch.....	31
A. The Balance of Patient and State Interests and the Inherent Uncertainty as to What Process May be Immediately Due a Mental Patient Require Focus on the Adequacy of State Postdeprivation Remedies.....	37



**TABLE OF CONTENTS**  
(Continued)

	<u>Page No.</u>
B. Postdeprivation Remedies Under Florida Law Are Adequate to Provide Burch Due Process.....	48
II. The Decision Below Cannot Be Reconciled With This Court's Decisions in <u>Parratt v. Taylor</u> and Related Cases.....	54
A. The Court of Appeals Misapplied This Court's Decisions in <u>Parratt</u> and <u>Hudson</u> .....	54
B. This Court Decided in <u>Ingraham v. Wright</u> That Postdeprivation Remedies Can Provide Adequate Due Process For The Deprivation of a Liberty Interest.....	65
C. This Court's Decision in <u>Logan</u> Does Not Govern The Present Case..	69
Conclusion .....	80
Certificate of Service .....	81
Appendix .....	A-1

**TABLE OF AUTHORITIES**

<u>CASES</u>	<u>Page No.</u>
<u>Addington v. Texas</u> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).....	<i>passim</i>
<u>Armstrong v. Manzo</u> , 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).....	55
<u>Baker v. McCollan</u> , 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)(.....	46,47
<u>Bonner v. Coughlin</u> , 517 F.2d 1311 (1975), modified, <u>en banc</u> , 545 F.2d. 565 (7th Cir. 1976), <u>cert. d denied</u> , 435 U.S. 932 (1978).....	58
<u>Brower v. County of Inyo</u> , 817 F.2d 540 (9th Cir. 1987), <u>rev'd on other</u> <u>grounds</u> , — U.S. —, 109 S.Ct. 1378, 101 L.Ed.2d 904 (1989).....	73
<u>Bryant v. School Board of Duval County</u> , 399 So.2d 417 (Fla. 1st DCA 1981), <u>aff'd in part</u> , <u>reversed in part</u> , 417 So.2d 658 (Fla, 1982).....	52

# TABLE OF AUTHORITIES

## CASES

## Page No.

Burch v. Apalachee Community  
Mental Health Services, Inc.,  
et al.,  
804 F.2d 1549 (11th Cir. 1986),  
vacated, 812 F.2d 1339  
(11th Cir. 1986).....1,10,12

Burch v. Apalachee Community  
Mental Health Services, Inc.,  
et al.,  
812 F.2d 1339  
(11th Cir. 1986).....1,12

Burch v. Apalachee Community  
Mental Health Services, Inc.,  
et al.,  
840 F.2d 797 (11th Cir.  
1988)(en banc) cert.  
granted, 57 U.S.L.W. 3582....*passim*

Daniels v. Williams,  
474 U.S. 327,  
106 S.Ct. 662,  
88 L.Ed.2d 662 (1986).....*passim*

Easter House v. Felder,  
852 F.2d 901  
(7th Cir. 1988).....72

Estelle v. Gamble,  
429 U.S. 97, 97 S.Ct. 285,  
50 L.Ed.2d 251, reh. den.,  
429 U.S. 1006, 97 S.Ct. 798,  
50 L.Ed.2d 785 (1976).....66

# TABLE OF AUTHORITIES

## CASES

## Page No.

Everett v. Florida Institute  
of Technology,  
503 So.2d 1382 (Fla. 5th DCA  
1987), appeal dismissed,  
511 So.2d 998 (Fla. 1987).50,51,61

Flower Cab Co. v. Petite,  
688 F.2d 192  
(7th Circuit 1982).....73

Harris v. Lewis State Bank,  
436 So.2d 338  
(Fla. 1st DCA 1983).....61

Haygood v. Younger,  
769 F.2d 1350 (9th Circuit  
1985)(en banc), cert.  
denied, 478 U.S. 1020 (1986).73,76

Hewitt v. Helms,  
459 U.S. 464,  
103 S.Ct. 864,  
74 L.Ed.2d 675 (1983).....32

Hudson v. Palmer,  
468 U.S. 517,  
104 S.Ct. 3194,  
82 L.Ed.2d 393 (1984).....*passim*

Ingraham v. Wright,  
430 U.S. 651,  
97 S.Ct. 1401,  
51 L.Ed.2d 711 (1977).....*passim*

Johnson v. Wiener,  
155 Fla. 169,  
19 So.2d 699 (1944).....62

# TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page No.</u>
<u>Kentucky v. Graham,</u> 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).....	52,53
<u>Kugler v. Helfont,</u> 421 U.S. 117, 95 S.Ct. 24, 44 L.Ed.2d 15, <u>reh. den.</u> , 421 U.S. 1017, 95 S.Ct. 2425, 44 L.Ed.2d 686 (1975).....	29
<u>Logan v. Zimmerman Brush Co.,</u> 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).....	<i>passim</i>
<u>Lynch v. Household Finance Corp.,</u> 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424, <u>reh. den.</u> , 406 U.S. 911, 92 S.Ct. 161, 31 L.Ed.2d 822 (1972).....	11,65,66
<u>Mann v. City of Tucson,</u> 782 F.2d 790 (9th Cir. 1986).....	34,35
<u>Mathews v. Eldridge,</u> 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	35,38
<u>Morrissey v. Brewer,</u> 408 U.S. 471, 92 S.Ct. 893, 47 L.Ed.2d 18 (1972).....	65

# TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page No.</u>
<u>O'Connor v. Donaldson,</u> 422 U.S. 575, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).....	31,32
<u>Parham v. J.R.,</u> 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).....	<i>passim</i>
<u>Parratt v. Taylor,</u> 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).....	<i>passim</i>
<u>Sanders v. Kennedy,</u> 794 F.2d 478 (9th Cir. 1986).....	74
<u>Youngberg v. Romeo,</u> 457 U.S. 307; 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)..	40,51, 65,66
<u>CONSTITUTION, STATUTES, AND RULES</u>	
<u>United States Constitution</u>	
Amendment XIV.....	
<i>passim</i>	
<u>United States Code Annotated:</u>	
28 U.S.C. § 1254(1).....	
2	
42 U.S.C. §§1981-1988....	
66	
42 U.S.C. § 1983.....	
<i>passim</i>	



**TABLE OF AUTHORITIES**

**Page No.**

**CONSTITUTION, STATUTES, AND RULES**

**United States Code Annotated:**

42 U.S.C. § 2101(c).....2

**Florida Statutes (1981)**

**Chapter 284**

§ 284.38.....53

**Chapter 394, Part I.....passim**

§ 394.453.....16

§ 394.455(11).....18

§ 394.458(13).....22

§ 394.359(2).....48

§ 394.459(3)(a)....16,18,46

§ 394.459(10).....23

§ 394.459(12).....18

§ 394.459(13).....50,53,61

§ 394.463.....20,59

§ 394.463(3).....19

§ 394.465(2).....19,46

§ 394.465(3).....45

§ 394.467.....32

§ 394.467(1)(b).....21

§ 394.467(2).....22

§ 394.467(2)(a-d).....21

§ 394.467(3).....21,48

**TABLE OF AUTHORITIES**  
**(Continued)**

**Page No.**

**Chapter 768 (1981)**

§ 768.28.....3,22,47,53

§ 728.28(1).....61

§ 768.28(5).....22, 49

§ 768.28(9).....51

§ 768.30.....22,49

**Chapter 394 (Supp. 1982)**

§ 394.463(2)(b).....20

**CONSTITUTION, STATUTES, AND RULES**

**Federal Rules of Civil Procedure**

Rule 12(b)(6).....8

Rule 55.....8

**Supreme Court Rules**

Rule 20.....1

**ARTICLES**

**Albers, Pasewark and Meyer,**  
**Involuntary Hospitalization**  
**and Psychiatric Testimony:**

**The Fallibility of the Doctrine**  
**of Immaculate Perception,**

**6 Cap.L.Rev. 11 (1976)...39**

**TABLE OF AUTHORITIES**  
(Continued)

**Page No.**

**ARTICLES**

<u>Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudication,</u> 42 Ford.L.Rev. 611 (1974).....	39
--	----

**BRIEF FOR PETITIONERS**

**OPINIONS BELOW**

The March 18, 1988, en banc decision of the United States Court of Appeals for the Eleventh Circuit reversing the district court is reported at 840 F.2d 797. (Pet. App. 1) The order granting rehearing en banc and vacating the panel opinion is reported at 812 F.2d 1339. (Pet. App. 98) The panel decision of the Court of Appeals affirming the District Court is reported at 804 F.2d 1549. (Pet. App. 100)

The opinion and judgment of the United States District Court for the Northern District of Florida is not reported. (Pet. App. 134)

### JURISDICTION

The en banc decision of the Court of Appeals was entered on March 18, 1988. The petition for a writ of certiorari was filed and docketed within the period established by Supreme Court Rule 20 and 28 U.S.C. §2101(c). The Court granted the petition on March 6, 1989. 57 U.S.L.W. 3582.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV provides in pertinent part:

Section I . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The Civil Rights Act of 1871 (42 U.S.C. §1983) provides:

Every person who, under color of any statute, ordinance, regu-

lation, custom, or usage, of State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. . . .

The "Florida Mental Health Act," also known as "The Baker Act," Chapter 394, Part I, Florida Statutes (1981), is set forth in the appendix to this brief. (App. 1)

Section 768.28, Florida Statutes (1981), a state waiver of sovereign immunity in tort, is set forth in the appendix to this brief. (App. 90)

### STATEMENT OF THE CASE

Respondent Darrell Burch filed this action under 42 U.S.C. § 1983 against Apalachee Community Mental Health Services, Inc. ("ACMHS"), a community



mental health facility in Tallahassee, Florida, and eleven named employees of the Florida State Hospital, a state treatment facility for the mentally ill.<sup>1</sup>

Burch sought damages for the alleged denial of his Fourteenth Amendment procedural due process rights during the course of his admission to and stay at both facilities.

A. Background Facts.

Burch was taken to ACMHS on December 7, 1981, by a concerned citizen who found him wandering along a highway. Looking at the medical records attached to and incorporated in the complaint, the en banc decision below states that:

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<sup>1</sup> Apalachee Community Mental Health Services, Inc., is a public facility designated by the State as capable of receiving patients suffering from mental illnesses. It did not petition this court for certiorari and is not a party to this proceeding.

Upon his arrival, Burch was hallucinating, confused, disoriented, and clearly psychotic, was wearing no shoes, and believed that he was in heaven. At the request of ACMHS, Burch signed a form for voluntary admission and a form for authorization for treatment.

Burch v. Apalachee Community Mental Health Services, Inc., 840 F.2d 797, 799 (11th Cir. 1988)(en banc)(Pet. App. 4).

Burch remained at ACMHS for three days, during which time ACMHS diagnosed his condition as paranoid schizophrenia and administered psychotropic drugs (Pet. App. 5). Because ACMHS could not provide the treatment Burch needed, he was transferred to Florida State Hospital ("FSH") on December 10, 1981. (Id.)

While at ACMHS, Burch signed a form requesting voluntary admission to FSH and another authorizing treatment. (R

10, 11; Complaint Exs. A-1, A-2) On arrival at FSH, Burch signed forms for voluntary admission and treatment. (R 14, 15; Exs. C-1, C-2) On December 23, 1981, he signed another form for authorization of treatment. (R 21; Ex. E-5) Records attached to the complaint indicate that Burch reported using marijuana, mushrooms, and hash, and was suffering hallucinations at the time of his admission.<sup>2</sup> Burch remained a patient at FSH until May 7, 1982, when he was released. During this time, no hearing was held with respect to Burch's placement and treatment. (Id. at 6)

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<sup>2</sup> (R 26; Ex. F-5) The same records also indicate that on admission to FSH, Burch suffered from a possible nose fracture and bruises on his chest, was incontinent of urine and had dried blood on his chest, feet, nails and mandible. (R 22, 24, 26; Exs. F1, F3 and F5 to complaint.)

#### B. The Complaint.

In February, 1985, Burch filed his complaint in the federal District Court for the Northern District of Florida seeking damages under 42 U.S.C. §1983. (Pet. App. 201, *et seq.*) Count III of the complaint was directed at the eleven named employees of FSH. In substance, Count III alleged:

1. Defendants knew or should have known that Burch was incapable of voluntary, informed consent to admission and treatment. (Pet. App. 201)

2. Defendants confined and imprisoned Burch and subjected him to involuntary commitment and treatment from December 10, 1981, to May 7, 1982. (Id.)

3. Burch was without benefit of counsel and no hearing was held to challenge his "involuntary admission and treatment." (Id. at 202)

4. Defendants deprived Burch of his liberty without due process of law in contravention of the Fourteenth Amendment. (Id.)

5. Defendants "acted with willful, wanton and reckless

disregard of and indifference to Plaintiff's constitutionally guaranteed right to due process of law. Plaintiff has been and continues to be substantially damaged by the aforesaid acts of Defendants." (Id.)

C. Rulings Below.

Defendants filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P., asserting the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion and dismissed the complaint.<sup>3</sup> In dismissing the complaint, the District Court relied

<sup>3</sup> Although the order of the District Court clearly considered the medical records attached as exhibits to the complaint, the order did not by its terms treat the defendants' motion as one for summary judgment under Rule 56, Fed.R.Civ.P. However, Rule 12(b)(6) provides that if matters outside the pleadings are presented to the court, the motion shall be treated and disposed of as provided in Rule 56. The complaint purports to incorporate within it the attached medical records. Apparently the District Court did not consider these "outside the pleadings."

primarily on Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984).<sup>4</sup> That court reasoned that the failure of the staff of FSH to follow the involuntary placement procedures prescribed by Florida law made it "impracticable, if indeed not impossible, to provide [other] adequate predeprivation process to the plaintiff." (Pet. App. 139) The District Court found that Florida's statutory procedures regarding voluntary and involuntary placement were adequate

<sup>4</sup> Parratt held that the negligent loss of a prisoner's hobbykit by prison officials who had failed to follow established procedures for handling mail did not state a claim for relief under 42 U.S.C. §1983 when adequate state procedures existed whereby the prisoner could be compensated. Hudson held that even the intentional deprivation of a prisoner's property by a random, unauthorized act of a state employee likewise stated no claim if a meaningful post-deprivation remedy were available to the prisoner.



to insure due process of law and further that Florida law provided adequate postdeprivation due process in the form of an action for damages. (Id.)

A panel of the Court of Appeals affirmed the District Court decision. Burch v. Apalachee Community Mental Health Services, Inc., et al., 804 F.2d 1549 (11th Cir. 1986) (Pet. App. 100). Reviewing the complaint, the panel opinion concluded that:

Burch has not alleged that Florida statutory procedures were constitutionally inadequate; nor has he made a colorable claim that the governing boards of ACMHS or FSH had a policy, custom or regular practice of not following the mandated procedure.

804 F.2d at 1556 (Pet. App. 127).

Taking the allegations of the complaint as true, the decision stated that "we cannot doubt that [Burch] has a colorable claim that the defendants failed to follow the [state] statutory

procedure." Id. at 1552 (Pet. App. 106). The panel read the complaint as alleging no more than that the defendants "by willfully confining and treating [Burch] without a valid consent, deprived him of his procedural due process right to a judicial hearing." Id. at 1553 (Pet. App. 111).

In these circumstances, the panel opinion found the logic of Parratt and Hudson controlling and held on the basis of Lynch v. Household Finance Corp., 405 U.S. 538 (1972), that the alleged deprivation of procedural due process should be analyzed in an identical fashion regardless of whether the deprivation affected liberty or property. It noted that its analysis was harmonious with that of Ingraham v. Wright, 430 U.S. 651 (1977), involving the alleged deprivation of a liberty interest in the

context of corporal punishment administered without prior notice or hearing in public school systems. (Pet. App. 125)

The panel concluded that the State could not predict that FSH employees would ignore state law and thus, as in Parratt and Hudson, it could not "establish any type of predeprivation hearing, beyond that provided by the statutory commitment procedures, to protect Burch from random and unauthorized acts." 804 F.2d at 1556 (Pet. App. 128). Finding Florida's postdeprivation tort remedies adequate, the panel affirmed that Burch had stated no claim for relief under 42 U.S.C. §1983.

The Court of Appeals then granted rehearing en banc, vacating the panel decision. 812 F.2d 1339 (Pet. App. 98). On rehearing en banc, eight judges of the court agreed that the complaint

stated a procedural due process claim for relief. 840 F.2d 797 (Pet. App. 1). Five judges dissented. Id. at 810 (Pet. App. 56). In addition, of the eight member majority, five specifically concurred in an opinion stating that Burch had also raised a claim for a substantive due process violation and should be permitted to amend his pleadings accordingly. Id. at 803 (Pet. App. 27).<sup>5</sup>

The plurality opinion reasoned that the rationale of Parratt applies only when the random and unauthorized conduct was that of a state actor who lacked authority from the State to deprive persons of constitutionally protected interests. Because FSH employees had

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<sup>5</sup> In addition, Judge Clark filed a concurring opinion (Pet. App. 32), and Judge Anderson, joined by Judge Godbold, filed a specially concurring opinion (Pet. App. 47).

authority to deprive Burch of his liberty, they -- and therefore the State -- were in a position to provide for predeprivation due process. 840 F.2d at 802 n. 10 (Pet. App. 19). Hence, because "predeprivation procedures were practicable . . . postdeprivation remedies cannot provide due process." Id. at 801 (Pet. App. 18). The predeprivation hearing was practicable "because the appellees had both the ability to predict that one was required and the duty because of their state-clothed authority to provide one." Id. at 802 (Pet. App. 19).

As to Burch's complaint, the plurality opinion of the Court of Appeals stated that:

In the present case, Burch has alleged that the appellees "willful[ly], wanton[ly] and [with] reckless disregard" deprived him of his liberty without due process of law by having

him sign forms for voluntary admission and treatment when he was not competent to do so. Although we are mindful that plaintiffs cannot simply invoke such talismanic allegations to escape Daniels' reach [Daniels v. Williams, 474 U.S. 327 (1986)], we hold that Burch has alleged a deprivation in the constitutional sense. . . . Burch's deprivation of liberty stems from the abuse of power that the Due Process Clause and Section 1983 seek to deter.

Id. at 802 (Pet. App. 22).

In Daniels v. Williams, 474 U.S. 327 (1986), this Court partially overruled Parratt "to the extent that [Parratt] states mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." Id. at 330, 331. The en banc decision found that Daniels' analysis did not require dismissal of the complaint because Burch did not allege that the defendants' negligence deprived him of his liberty. 840 F.2d



at 800 n. 6 (Pet. App. 9). It further stated that the "state officials" at FSH had "abused their state-clothed power," thus distinguishing Burch's claim from other §1983 cases "seeking recovery based upon mere torts of state officials." 840 F.2d at 803 n. 12 (Pet. App. 26). Therefore, although both the District Court and the panel decision had found Florida's postdeprivation remedies adequate, the en banc decision did not find it necessary to review them.

D. Florida's Statutory Scheme for Placement of the Mentally Ill.

The Florida law in effect now and at the time of Burch's admission and treatment is known as "The Florida Mental Health Act" or "The Baker Act."<sup>6</sup>

<sup>6</sup> Chapter 394, Part I, Florida Statutes (1981). All pertinent sections of the 1981 statutes are set out in their entirety in the appendix to this brief. (App. 1, *et seq.*)

Section 394.453, Florida Statutes (1981), provides in part that:

It is intended that patients shall be provided with emergency service and temporary detention for evaluation when required; that patients be admitted to treatment facilities on a voluntary basis when extended or continuing care is needed and unavailable in the community; that involuntary placement be provided only when expert evaluation determines that it is necessary, and that individual dignity and human rights be guaranteed to all persons admitted to mental health facilities. (Emphasis supplied.) (App. 2)

1. Voluntary Placement.

A patient entering a facility is asked to give "express and informed consent" to treatment. See § 394.459(3)(a) (App. 24). "Express and informed consent" is defined as:

[C]onsent voluntarily given in writing after sufficient explanation and disclosure of the subject matter involved to enable the person whose consent is sought to make a knowing and willful decision without any fraud, deceit, duress, or any other form of constraint or coercion.

§394.455(22), Florida Statutes (1981) (App. 11). If a voluntary patient refuses his consent or revokes consent, he is to be discharged or, in the alternative, proceedings for involuntary placement begun. §394.459(3)(a) (App. 24). If the treatment refused or revoked is deemed essential to appropriate care, the facility administrator may initiate administrative proceedings for appointment of a guardian advocate to act on the patient's behalf relating to provision of express and informed consent. Id.

Whenever a patient is admitted to a facility, written notice must be given his legal guardian or representative. If the patient has no legal guardian, he is entitled to the appointment of two representatives.<sup>7</sup> §394.459(12) (App.

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<sup>7</sup> At least one representative was

38) At the time of admission and every six months thereafter, the voluntary patient and his guardian or representative must be given written notice of the patient's right to discharge. §394.463(3) (App. 56)

The guardian or representative of a voluntary patient may request his discharge in writing at any time. §394.465(2) (App. 58) The voluntary patient also may make a written or oral request for discharge at any time. Id. If oral, he must be given assistance in preparing a written request. The administrator must then discharge the patient within three days or initiate proceedings for involuntary placement. Id.

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appointed for Burch on December 11, 1981. See R 20, Ex. E-4 to Complaint.



A person may be admitted to a receiving facility on an emergency basis. In 1981, a person so admitted had to be released within 48 hours unless he gave express and informed consent to further evaluation and treatment or involuntary placement proceedings were initiated. §394.463, Florida Statutes (1981)(App. 48).<sup>8</sup>

2. Involuntary Placement.

A person may be placed in a treatment facility on an involuntary basis if he is mentally ill and, because of the illness, is:

1. Likely to injure himself or others if allowed to remain at liberty, or

2. In need of care or treatment which, if not provided, may result in neglect or refusal to

<sup>8</sup> A mental patient now may be detained on an emergency basis for up to 72 hours. §394.463(2)(b), Florida Statutes (Supp. 1982).

care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being.

§394.467(1)(b), Florida Statutes (1981) (App. 63).

Involuntary placement requires a judicial proceeding with substantial notice requirements to the patient or his guardian or representative. §394.467(2)(a-d) and (3) (App. 66,70). The person has a right to an attorney and to examination by an independent mental health expert. §394.467(3) (App. 70). If the patient is not competent to consent to treatment, the court must appoint a guardian advocate to act on the patient's behalf relating to provision of informed consent. Id.

The facility may retain an involuntary patient for up to six months, at which point it must seek an order from an administrative hearing



officer authorizing continued placement.  
§394.467(2) (App. 64).

E. Remedies Under Florida Law.

Pursuant to §768.28, Florida Statutes (1981), Florida waived sovereign immunity in tort. (App. 90) The waiver became effective in 1974 and 1975. §768.30, Florida Statutes (1981) (App. 100). The waiver provided for a limitation of \$100,000.00 on the amount of damages an individual may recover. §768.28(5), Florida Statutes (1981) (App. 92).

Section 394.458(13), Florida Statutes (1981) (App. 41), recognizes a cause of action for damages against a person who violates or abuses the rights or privileges provided patients under the Baker Act. The statute provides immunity for acts taken in good faith but does not relieve a person from liability for acts of negligence. Id.

A patient, friend, relative, guardian, representative, or attorney may question the patient's detention under the Baker Act by habeas corpus proceedings. §394.459(10), Florida Statutes (1981) (App. 36). The patient, his guardian or representative may also challenge the abuse of any procedure authorized by the Baker Act or the denial of any right or privilege granted by the Act. Id.

SUMMARY OF ARGUMENT

The issue here is whether the Respondent's complaint states a claim for relief under 42 U.S.C. §1983. Burch alleges that when taken to FSH he was unable to give his informed consent to admission and treatment, and that petitioners "willfully, wantonly and recklessly" deprived him of a hearing

required for involuntary placement at FSH. The allegations of the complaint and medical records attached thereto make it clear that respondent was severely disturbed and in need of psychiatric treatment.

The petitioners contend that Burch has no claim for relief cognizable under §1983 because state remedies are adequate to provide him complete due process. The appropriate due process analysis cannot be separated from the context of this case -- care and treatment of the mentally ill. In deciding exactly what process is due Burch, the past decisions of this Court require a balancing of the mental patient's interests, the State's interests, the protections afforded by established state procedures, and the value or burden of additional procedures or safeguards.

Florida law provides more than adequate procedures and remedies, and, therefore, consistent with this Court's analysis in Ingraham v. Wright, 430 U.S. 651 (1977), Burch has no claim for damages cognizable under §1983.

The Court of Appeals failed to undertake the above due process analysis. It briefly adverted to countervailing interests of the State and the Respondent but failed to weigh and balance those interests. Instead, it held that petitioners' actions were an abuse of their state-clothed authority and therefore actionable under §1983. The court's analysis completely ignores the medical and psychiatric context of this case and the uncertain nature of psychiatric diagnosis that this Court has repeatedly recognized. It is that very uncertainty that compels a balancing of

patient and State interests and consideration of state remedies for erroneous decisions or wrongful acts. If mental health professionals are subject to unlimited liability under §1983 for misjudgments as to competency, the State necessarily will be reluctant to accept voluntary patients. As a result, more resources will be devoted to hearings, treatment will be delayed and fewer mentally ill persons may seek state care. The Court of Appeals erred in failing to consider the adequacy of Florida remedies.

Because the complaint alleges that the deprivation of Burch's liberty interest was occasioned by unforeseeable acts rather than an established state procedure, this Court's decisions in Parratt and Hudson likewise compel examination of state remedies to deter-

mine whether the State affords complete due process. The due process analysis applied to property interests violated by the State can also apply to liberty interests. See Ingraham v. Wright, supra. Because Florida provides remedies that afford complete due process, Burch's claim is not actionable under §1983.

The unsupported allegation that petitioners acted willfully, wantonly and recklessly does not suffice to state a claim for relief under § 1983. In the absence of appropriate allegations, the Court of Appeals erred in attempting to distinguish this case on the ground that petitioners abused their "state-clothed" authority. Their acts, even if willful, are not different in kind from that of a teacher who, having state-clothed authority, paddles a child and causes



injury, see Ingraham, supra, or from that of a prison official who, with state-clothed authority, searches a cell and intentionally destroys a prisoner's property. See Hudson v. Palmer, 468 U.S. 517 (1984). In either event, the Court has held that such misuse of authority is not actionable under §1983 where state remedies are adequate to afford complete due process.

Burch was not deprived of a liberty interest by the operation of an established state procedure but by the failure to observe established state procedures. Because those procedures did not cause the deprivation, this case is not controlled by Logan v. Zimmerman Brush Co., 455 U.S. at 422 (1982).

## ARGUMENT

### INTRODUCTION

There can be no doubt that Respondent Burch was acutely in need of medical and psychiatric treatment when brought to Florida State Hospital on December 10, 1981. Burch has never contended otherwise in the course of these proceedings or disputed the diagnosis of his condition as paranoid schizophrenia.

The complaint presents a claim for damages for the deprivation of liberty without due process of law. In considering the correctness of dismissal for failure to state a claim, the allegations of the complaint are to be taken as true. Kugler v. Helfont, 421 U.S. 122, 125 (1975). Hence, it must be taken as fact that Burch was unable to give his informed consent to admission and treatment and that he had no

judicial hearing. The plurality opinion of the Court of Appeals attached no "talismanic" significance to the terms "willful, wanton and reckless," merely observing that having Burch sign forms for voluntary admission and treatment when he was not competent to do so was "an abuse of power that the Due Process Clause and Section 1983 seek to deter." 840 F.2d at 802. The plurality opinion concluded that:

[T]aking Burch's allegations as true, his procedural due process rights were violated after he was committed beyond forty-eight hours without a hearing.

840 F.2d at 802 (Pet. App. 20).

No matter whether viewed in terms of "willfulness" or "abuse of power," Burch's complaint questions his competency to give informed consent to admission and treatment and the petitioners' judgment of his ability to give that

consent. Petitioners strongly take issue with the conclusion that a misjudgment of Burch's competency, and the bare allegation that he was willfully confined, state a claim for relief under §1983 without regard to whether remedies under Florida law provide all the process that Burch may be constitutionally due.

**I. THE ELEVENTH CIRCUIT COURT OF APPEALS ADOPTED AN INCORRECT PROCEDURAL DUE PROCESS ANALYSIS AND FAILED TO BALANCE INDIVIDUAL AND STATE INTERESTS IN DECIDING WHAT PROCESS WAS DUE RESPONDENT BURCH.**

If Burch was unable to give informed consent to admission and treatment at FSH, he was entitled to a hearing before involuntary placement in that institution under both the Fourteenth Amendment and applicable state law. See Addington v. Texas, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 575



(1975); §394.467, Florida Statutes (1981) (Pet. App. 63).<sup>9</sup> There is no question, however, but that the State may confine a mentally ill person if appropriate procedural due process is afforded. Addington, supra. In this case, taking the allegations of the complaint as true, the requisite hearing was not afforded.<sup>10</sup>

This acknowledgment only begins the due process inquiry, however, and the fact that no hearing was held does not alone suffice to state a claim under

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<sup>9</sup> Liberty interests protected by the Fourteenth Amendment may arise from the Due Process Clause itself and the laws of the States. Hewitt v. Helms, 459 U.S. 464, 466 (1983).

<sup>10</sup> Burch's brief in opposition to the petition for certiorari acknowledges that the issue before the Court involves a question of procedural due process, not substantive, saying "since this case was decided on procedural due process grounds, this is not the appropriate case in which to clarify substantive due process issues." Br. in Opp. at 3.

§1983. Even though a liberty interest is here at issue, the State submits that under this Court's recent decisions a determination of whether the deprivation was "without due process" necessarily involves consideration of the adequacy of state remedies. See Parratt v. Taylor, 451 U.S. 527 (1981)(negligent loss of inmate's property by prison officials); Hudson v. Palmer, 468 U.S. 517 (1984)(intentional destruction of inmate's personal property); Ingraham v. Wright, 430 U.S. 651 (1977)(corporal punishment causing injury to public school students administered without prior hearing).

This case closely parallels Ingraham, supra, in which the plaintiffs sought damages for corporal punishment and, in addition, injunctive relief against state laws and policies



permitting such punishment. Although Burch seeks only damages for a single due process violation, this suit, calling into question a medical and psychiatric judgment on his ability to give informed consent, is in effect an indirect attack upon Florida's voluntary placement procedures. Those procedures seek to facilitate treatment of disturbed persons on a voluntary basis, an approach which benefits the patient and the State. Thus, as in Ingraham, the appropriate due process analysis requires a balancing of the individual's and the State's interests.

This being so, it is probably not necessary in this case to establish the brightline rule that the Parratt and Hudson analysis extends to all unforeseeable deprivations of liberty.<sup>11</sup> The

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<sup>11</sup> This has been suggested in Mann v.

due process analysis in Ingraham did not reason that where a procedural due process interest is implicated, the single and automatic inquiry is the adequacy of state remedies to afford the complete process due. To identify "the specific dictates of due process," Ingraham relied on the approach set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), considering and balancing three factors: (1) the private interest of the individual affected by the state action; (2) the risk of erroneous deprivation of the interest and the probable value of

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City of Tuscon, 782 F.2d 790, 794 (9th Cir. 1986) (Judge Sneed concurring). Judge Sneed, reviewing the Parratt, Hudson and Daniels trilogy, suggests that the Parratt analysis could embrace "all unforeseeable deprivations of life, liberty and property," the justification being that the state by its conduct has not forfeited its opportunity to provide a remedy and "Parratt's application would remove from federal courts many fairly simple 'tort' cases. Id. at 798.

additional or substitute safeguards; and (3) the government's interest, including the function involved, and the fiscal and administrative burdens additional or substitute procedural requirements would entail. Ingraham, supra, at 675. This analysis is particularly appropriate in the problematic universe of psychiatric diagnosis. The due process analysis cannot be divorced from the context in which the case arises or from the ultimate decision -- the medical judgment -- that is made. Parham v. J.R., 442 U.S. 584, 608 (1979). Here, the Court of Appeals gave no consideration whatever to that context or to the Florida laws which could rectify any wrong committed. Instead, the Court of Appeals rendered a narrow and strained interpretation of the Parratt and Hudson due process analysis. Although the

court briefly alluded to the counter-vailing individual and State interests, it failed to weigh and balance the interests as this Court has done when considering the rights of the mentally ill in the care of the State. See 840 F.2d at 800 (Pet. App. 12).

**A. THE BALANCE OF PATIENT AND STATE INTERESTS AND THE INHERENT UNCERTAINTY AS TO WHAT PROCESS MAY BE IMMEDIATELY DUE A MENTAL PATIENT REQUIRE FOCUS ON THE ADEQUACY OF STATE POSTDEPRIVATION REMEDIES.**

The interest of the State in providing care to mentally disturbed persons who are unable to care for themselves cannot be questioned. See Addington v. Texas, 441 U.S. 418 (1979). But in the world of the disturbed, there is seldom, if ever, any sharp distinction between those who can comprehend their condition and needs, and therefore validly consent to treatment, and those who cannot. "The subtleties and nuances of



psychiatric diagnosis render certainties beyond reach in most situations," and it is "very difficult for the expert physician to offer definite conclusions about any particular patient." Id. at 430.

The fact that we take as true the allegation that Burch was unable to give informed consent does not control the analysis and outcome of this case. The Court has emphasized precisely this point in considering the rights of mentally disturbed children subject to commitment for institutional care:

[I]t bears repeating that procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.

Parham v. J.R., 442 U.S. at 613 and 615 (1979), quoting from Mathews v. Eldridge, 424 U.S. 319, 344 (1976). Due

process rules must take into account the doubt and nuance of the psychiatric judgment, not the easy certainty of the legal allegation, for "[w]hat process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made." Parham, supra, at 608.

In the generality of cases, whether a disturbed person can give informed consent will nearly always be open to question. The validity of any mental patient's consent -- and therefore the need for a judicial hearing -- is inherently uncertain.<sup>12</sup> The process due

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<sup>12</sup> It is generally recognized that "there is no justification for the assumption that mental illness always destroys judgment." Note, Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudication, 42 Ford.L.Rev. 611, 616 (1974). See generally Albers, Pasewark and Meyer, Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of Immaculate Perception, 6 Cap.L.Rev. 11 (1976).



the mental patient in these circumstance must therefore consider and balance the interests of both the patient and the State. See Addington, supra, at 426; Parham, supra, at 599-600; Youngberg v. Romeo, 457 U.S. 307, 321 (1982). State procedures must protect the rights of the individual "without unduly burdening legitimate efforts . . . to deal with difficult social problems." Parham, supra, at 608 n. 16. This analysis leads ineluctably to the conclusion that the due process inquiry must focus on the adequacy of state procedures and postdeprivation remedies.

Application of the criteria of Mathews v. Eldridge, supra, requires that the Court consider:

1. Burch's liberty interest in having or not having a hearing for involuntary placement.

2. The State's interest in its established procedures and its interest

under its *parens patriae* powers in providing care to the mentally ill.

3. How well the established procedures protect against the risk of error in the decision as to whether a patient should be placed voluntarily or involuntarily.

Parham, supra, at 599-600; Addington, supra, at 426.

With respect to the first, it is difficult to conclude that the interest of a seriously ill person in having an adversary hearing to declare his incapacity to consent to hospital admission significantly outweighs, if it outweighs at all, his interest in prompt treatment.<sup>13</sup> First, such a hearing inevitably means delay in treatment.<sup>14</sup>

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<sup>13</sup> Assuming, of course, that no non-emergency surgical procedures or nonstandard therapies are contemplated. The consent form Burch signed did not authorize surgical procedures or electroconvulsive treatment. (R 21; Ex. E-5)

<sup>14</sup> The adversary trial in the Addington case, for example, lasted six days. 441 U.S. at 420.

Second, a declaration of "incompetency" -- for that is what it amounts to -- may well have an adverse and stigmatizing effect on the individual. Parham, supra, at 600; Addington, supra, at 425-426. It is certainly no exaggeration to say that some people may well refrain from seeking treatment if, when there is doubt, they must face a trial and placement as involuntary patients. Of such consequences this Court has said, "[a] person needing, but not receiving, appropriate medical care may well face even greater social ostracism resulting from the observable symptoms of an untreated disorder." Parham, supra, at 601. The *parens patriae* interest cannot be fulfilled if the admission process "is too onerous, too embarrassing, or too contentious." Id. at 605.

Consistent with this admonition, Florida law permits a voluntary patient, his guardian or representative, to request discharge at any time, and the hospital must then discharge the patient or begin involuntary placement proceedings. Contrary to the pejorative terminology of the Court of Appeals, Burch, as a voluntary patient, was not "committed to a mental institution." See 840 F.2d at 803 (Pet. App. 26).

The State's interests in voluntary placement do not differ significantly from the patient's. The State has an obvious interest in providing prompt care and treatment of the ill. It has a compelling interest in not having diverted to the legal system the limited resources that would otherwise be available for care and treatment. And this interest extends to:



[A]llocating priority to the diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming procedural minuets before the admission.

Parham, supra, at 605 (emphasis added).

As a corollary to this, the State "has significant interest in not imposing unnecessary procedural obstacles that may discourage the mentally ill or their families from seeking needed psychiatric assistance." Id.

The third factor to consider is the risk of error in voluntary placements. Because the risk is largely unknowable, the voluntary patient has ample procedural protections under Florida law. Florida's laws rightly encourage voluntary placement but also provide for a hearing for those unable to give informed consent. Given that mental impairment of some degree is what impels

people to seek state care, the question of who is able to give informed consent will nearly always be fraught with uncertainty. Florida protects those voluntarily placed by granting them or their guardian or representative the right to request discharge at anytime. A patient and his guardian or representative must be given written notice of his right to a discharge at the time of admission and each six months thereafter. §394.465(3), Florida Statutes (1981) (App. 61). Within three days of such a request, the patient must be released unless involuntary placement proceedings are begun. §394.465(2), Florida Statutes (1981) (Pet. App. 58). If a voluntary patient refuses treatment he must be discharged, or, if the treatment is essential to appropriate care, proceedings begun for appointment of a



guardian advocate to act on the patient's behalf. §394.459(3)(a), Florida Statutes (1981) (App. 24). If Florida's procedures are followed, the risk of error that a person will be wrongfully detained is small.

The possibility remains, however, that those entrusted with the care of a voluntary patient may fail to recognize or may ignore possible incompetency. That seems to be the gist of the complaint in the instant case. But the remedy for that is not and should not be an action under §1983. First, false imprisonment is a tort, not a constitutional offense. "[F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." Daniels v. Williams, 474 U.S. at 333, quoting Baker v. McCollan,

443 U.S. 137, 146 (1979). As a tort, false imprisonment is actionable under Florida law. §768.28, Florida Statutes (1981). Second, holding the threat of unlimited §1983 liability over the heads of individual professionals for not having held a hearing in the first instance is clearly unnecessary and counterproductive. Such a result would serve only to encourage the massive diversion of time, energy and resources to the judicial system in order to hold involuntary placement proceedings to guard against the §1983 lawsuit. The Court has clearly condemned such untoward results. Parham, supra, at 605-606, and n. 14.

The balance of patient and state interests dictates no need for additional procedures or extraordinary remedies in this case. Florida law is

adequate to provide the process due a mental patient whose rights are not respected.

**B. POSTDEPRIVATION REMEDIES UNDER FLORIDA LAW ARE ADEQUATE TO PROVIDE BURCH DUE PROCESS.**

Florida's mental health laws are comprehensive. A mentally ill person has the right to treatment. §394.459(2), Florida Statutes (1981) (App. 23). The law encourages voluntary admissions but clearly requires a judicial hearing for involuntary placement if the patient cannot give informed consent. §394.467(3), Florida Statutes (1981) (App. 70). With the required appointment of a guardian or representatives for even the voluntarily placed patients, Florida has gone to extraordinary lengths to protect procedural rights.

Remedies for the violation of a patient's rights are no less comprehensive. Florida has waived its sovereign immunity in tort. This waiver, effective at the time Burch was in the care of FSH, granted anyone injured by the tortious acts of state employees the right to recover up to \$100,000 in an action directly against the State or the state agency which employed the wrongdoer. §§768.28(5) and 768.30, Florida Statutes (1981) (App. 92, 100). Moreover, under this law, a judgment or verdict may be rendered in excess of the limitation of \$100,000 and the Florida Legislature may, in its discretion, pay the amount that exceeds the limitation. §768.28(5), Florida Statutes (1981) (App. 93).

False imprisonment is a tort under Florida law. Detaining a patient invo-

luntarily without compliance with the provisions of the Florida Mental Health Act constitutes false imprisonment and "[a]ll that is required are allegations that a person has been unlawfully restrained without color of authority."

Everett v. Florida Institute of Technology, 503 So.2d 1382 (Fla. 5th DCA 1987), appeal dismissed, 511 So.2d 998 (Fla. 1987).

In addition, §394.459(13), Florida Statutes (1981) (App. 41), provides a statutory cause of action for damages against any person who violates the rights or privileges of patients under the Mental Health Act. Although persons acting in good faith are not to be held liable, good faith does not preclude liability for negligence. Id. The good faith defense does not mean that Florida's statutory cause of action is

less comprehensive than §1983. In a §1983 action challenging treatment afforded involuntarily confined mental patients, this Court held that a professional's decision is presumptively valid, and:

[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Youngberg v. Romeo, supra, at 323.

Furthermore, good faith immunity bars §1983 liability where the failure to adhere to professional standards is attributable to budgetary constraints. Id.

We point out that §768.28(9)(a), Florida Statutes (1981) (App. 95), provides that neither the State nor its agencies shall be held liable for the



acts or omissions of an agent or employee acting outside the scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton or willful disregard of human rights. This exception does not deprive an injured party of a right to recover damages. In such instances the employee alone is liable, and the injured party must sue the employee, not the State. Bryant v. School Board of Duval County, 399 So.2d 417, 423 (Fla. 1st DCA 1981), affirmed in part, reversed in part, 417 So.2d 658 (Fla. 1982).

The fact that a plaintiff must then look to the assets of the individual does not mean that available state remedies compare unfavorably with §1983. Damages can be recovered under §1983 only in an action against a state

employee in his personal and individual capacity. Kentucky v. Graham, 473 U.S. 159 (1985) (Eleventh Amendment immunity of the States). Florida will not pay a judgment under §1983 on behalf of the employee when the employee intentionally caused the harm. See §284.38, Florida Statutes (1981) (App. 101). Section 284.38 remains in effect. Thus, when the harm is intentionally caused, the plaintiff, even in a §1983 action, must look to the personal assets of the state employee for recovery.

Although the Court has recognized that state remedies do not have to provide the exact equivalent of a §1983 action to afford complete due process, see Parratt v. Taylor, 451 U.S. 527, 544 (1981), it is submitted that the remedies available under §§394.459(13) and 768.28, Florida Statutes (1981), are

more than adequate to afford Burch all the process due for the alleged deprivation of his rights. The Court should so find and rule that he has no claim for relief under §1983.

**II. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN PARRATT V. TAYLOR AND RELATED CASES.**

**A. THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISIONS IN PARRATT AND HUDSON.**

For the reasons we have stated, Florida's postdeprivation remedies afford respondent sufficient due process, particularly given the unique demands of the provision of mental health services. We believe, moreover, that this Court's decisions in Parratt and Hudson require the same conclusion.

1. a. In Parratt, the Court addressed the negligent actions of a state official that resulted in the loss of

property. 451 U.S. at 530. After canvassing prior cases holding that postdeprivation process may be adequate when a predeprivation hearing is not feasible (id. at 538-541), the Court noted that an injury caused by negligence "is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. \* \* \* Indeed, in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation." Id. at 541. The Court therefore held that a postdeprivation remedy in the form of a tort action for recovery of the lost property satisfied the due process requirement of a hearing "at a meaningful time and in a meaningful manner.'" Id. at 545 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); see Parratt, 451 U.S. at 543-44.



In Hudson, this Court considered Parratt's implications in a case, like this one, that involved allegedly willful, but unauthorized, conduct by a state actor. There, a prison guard was alleged to have intentionally destroyed an inmate's property. The Court could find "no logical distinction" between the negligent conduct at issue in Parratt and "intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned," observing that "[t]he State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." 468 U.S. at 533. Indeed, the Court explained, "intentional acts are even more difficult to anticipate" since "one bent on intentionally depriving a

person of his property might well take affirmative steps to avoid signalling his intent." Id. at 533 (emphasis added). The Court therefore held -- unanimously on this point (see id. at 541 n. 4 (Stevens, J., concurring in part and dissenting in part)) -- that "'the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process.'" Id. at 14 (quoting Parratt, 451 U.S. at 539).<sup>15</sup>

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<sup>15</sup> As Justice Stevens summarized the law, under Hudson and Parratt, "when a predeprivation hearing is clearly not feasible, when the regime of state tort law provides a constitutionally unobjectionable system of recovery for the deprivation of property or liberty, and when there is no other challenge to the State's procedures, a valid § 1983 claim



In reaching this conclusion, the Court has recognized that it is the State's, rather than the individual state actor's, obligation to provide a system that makes adequate process available. Thus, when injury is caused by the misconduct of an individual state officer, "even though there is action 'under color of' state law sufficient to bring the [Fourteenth] amendment into play, the state action is not necessarily complete.'" Parratt, 451 U.S. at 542 (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (1975), modified en banc, 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978)). The adequacy of the state process cannot be determined "until and unless [the state] provides or refuses to provide a suit-  
is not stated." Daniels, 474 U.S. at 339 (Stevens, J., concurring in the judgment)(footnote omitted).

able postdeprivation remedy." Hudson, 468 U.S. at 533 (footnote omitted). In effect, the possibility that an individual state official will negligently or, as alleged here, "willful[ly], wanton[ly] and reckless[ly]" (Pet. App. 202) depart from established state procedure is an unavoidable defect in any state process and one that the state cannot be expected to eliminate altogether. A State therefore provides due process so long as it offers a mechanism, in the form of a state court action, that can correct the mistakes caused by such defects.

b. This case is controlled by Parratt and Hudson. Respondent's claim is grounded entirely on his allegation that particular state actors "knew or should have known that [he] was incapable of voluntary, knowing, understanding and

informed consent to admission and treatment at FSH." Pet. App. 201; see also id. at 195, 197-198. In such cases, the Florida Mental Health Act makes clear that a hearing must be held before the patient is admitted for further treatment. See § 394.463, Florida Statutes (1981). Thus, as in Hudson, respondent does not allege that the deprivation occurred "pursuant to an established state procedure" (468 U.S. at 534), or that "the procedures themselves are inadequate." Parratt, 451 U.S. at 543. See Pet. App. 13 n. 8. In these circumstances, respondent can make out a denial of due process only if Florida's postdeprivation remedies are inadequate.

There is every indication, however, that Florida would provide respondent with a full recovery. As the dissenting

judges pointed out (Pet. App. 74-76), there are at least three avenues available to Burch. First, Florida has waived its sovereign immunity "for itself and for its agencies or subdivisions" for injuries or property losses caused by a "negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment." § 768.28(1) Florida Statutes (1981). Second, the Florida Mental Health Act itself provides that "[a]ny person who violates or abuses any rights or privileges of patients provided by this act is liable for damages." Although immunity is granted for actions taken in good faith, the Act "does not relieve any person from liability if such person is guilty of negligence." § 394.459(13) Florida



Statutes (1981). Finally, respondent may well have a common law action for false imprisonment. In Florida, the essence of the tort of false imprisonment is an "'unlawful . . . deprivation of liberty.'" Harris v. Lewis State Bank, 436 So.2d 338, 341 (Fla. 1st DCA 1983)(quoting Johnson v. Weiner, 155 Fla. 169, 171, 19 So.2d 699, 700 (1944)). And a Florida Court of Appeal has recently held that charges "stemming from \* \* \* involuntary confinement as a mental patient \* \* \* without compliance with [the Florida Mental Health Act] \* \* \* adequately allege the tort of false imprisonment." Everett v. Florida Institute of Technology, 503 So.2d 1382, 1383 (Fla. 5th DCA 1987), appeal dismissed, 511 So.2d 998 (Fla. 1987).

2. A plurality of the Court of Appeals distinguished the Parratt case, however, and therefore never considered the adequacy of Florida's postdeprivation process. The plurality reasoned that the defendants in Parratt "lacked state-clothed authority to deprive the plaintiffs of their protected property interests" (Pet. App. 17)(emphasis in the original)). By contrast, in the plurality's view, petitioners in the present case "possessed state-clothed authority to deprive [respondent] of his liberty" (id. at 19). The plurality accordingly concluded that "[a] predeprivation hearing was practicable because the [petitioners] had both the ability to predict that one was required and the duty because of their state-clothed authority to provide one" (ibid. (emphasis in the original; footnote omitted)).



Parratt does not yield to the plurality's distinction. While it is surely true that petitioners possessed the authority to hospitalize respondent, they had no authority under Florida law to do so without affording respondent a timely hearing. Thus, like the prison officials in Parratt -- who possessed the authority to receive the prisoner's hobby kit, but not the authority to misplace it -- petitioners acted outside the authority conferred on them by state law. Respondent's loss of liberty, like the prisoner's property loss in Parratt (and in Hudson), was therefore the "result of a random and unauthorized act by \* \* \* state employee[s]" and "not a result of some established state procedure" (451 U.S. at 541). It follows as well that the State of Florida, like the State of Nebraska in Parratt, could

not have "predict[ed] precisely when the loss [would] occur" and could not have "provide[d] a meaningful hearing before the deprivation [took] place" (ibid.).

**B. THIS COURT DECIDED IN INGRAHAM V. WRIGHT THAT POSTDEPRIVATION REMEDIES CAN PROVIDE ADEQUATE DUE PROCESS FOR THE DEPRIVATION OF A LIBERTY INTEREST.**

Although the Court of Appeals did not specifically so state, its analysis clearly reflects an unwillingness to apply the rationale of Parratt and Hudson to the deprivation of a liberty interest. The court's reluctance is unwarranted for "due process is flexible and calls for such procedural protection as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Neither history nor logic compels a rigid distinction between property and liberty interests. See Lynch v. Household Finance Corp., 405

U.S. 538, 552 ("the dichotomy between personal liberties and property rights is a false one").

This Court has pointedly stated that its Due Process analysis in Parratt and Hudson was consistent with the approach taken by the Court in Ingraham v. Wright, 430 U.S. 651 (1977). See Parratt, at 451 U.S. 542-543, and Hudson, at 468 U.S. 533 and n. 14. Ingraham presented a claim for damages and injunctive relief under 42 U.S.C. §§1981-1988 on behalf of children subjected to corporal punishment in public schools without the benefit of a prior hearing. Although Fourteenth Amendment interests were implicated, 430 U.S. at 674, the question of what process was due the children -- given historical circumstances, the minimal risk of abuse or error and the need for quick and ef-

fective disciplinary measures in the school system -- required consideration of available state remedies. Finding those adequate to provide all the process due, the Court denied relief.

We do not rely on Ingraham in order to contend that Burch was not entitled to a hearing if he was unable to give his informed consent. Rather, if Ingraham is consistent with Hudson and Parratt, as the Court stated, then the analysis employed in those cases applies as well to the deprivation of a liberty interest, and the focus should be on the adequacy of state remedies.

In attempting to distinguish Parratt, the Court of Appeals said petitioners were clothed with state authority to deprive Burch of his liberty in determining "whether Burch had given his voluntary, knowing and express consent.



. . ." (Pet. App. 16,17) 840 F.2d at 801. In contrast, the court said the prison officials in Parratt lacked state-clothed authority to deprive inmates of their property interests. Id.

This distinction is wrong because the petitioners here were authorized only to make medical judgments, as best they could, in situations where uncertainty is generally beyond reach. See Addington v. Texas, 441 U.S. 413, 430 (1979). They had no authority to "willfully" deprive Burch of his liberty anymore than the prison officials in Hudson, who were authorized to search cells, could intentionally destroy an inmate's noncontraband property. Their "state-clothed" authority is no different from that of the classroom teacher in Ingraham who had state-clothed

authority to paddle, not to injure, the unruly student. Petitioners here had authority to initiate judicial proceedings, depending on their judgment, but not otherwise to detain Burch against his will. They may not have followed appropriate procedures, but neither did the official who handled prisoner mail in Parratt or the official who searched the cell in Hudson.

As shown, Florida was not in a position to prevent the random and unauthorized disregard of state law by its agents. Therefore, examination of state remedies is necessary and the Court of Appeals erred in not undertaking that inquiry.

**C. THIS COURT'S DECISION IN LOGAN  
DOES NOT GOVERN THE PRESENT CASE.**

Judge Clark, in his concurring opinion (Pet. App. 32-47), and Judges



Anderson and Godbold, in their opinion concurring specially (Id. at 47-56), concluded that this case is governed by Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and not by Parratt and Hudson. We disagree.

In Logan, appellant filed a complaint with the Illinois Fair Employment Practices Commission, alleging employment discrimination on the basis of his handicap. "Apparently through inadvertence" (455 U.S. at 426), however, appellant's claim was not heard within the statutory period, and accordingly the complaint was dismissed. The Illinois Supreme Court thereafter held that the passing of the statutory period barred appellant's claim; it also rejected appellant's assertion that such a bar violated his due process and equal protection rights under the Fourteenth

Amendment. This Court reversed, holding that the State, having conferred the right to complain of unfair employment practices, deprived the appellant of property without due process when it terminated his claim without a hearing. Moreover, the Court rejected the contention that, under Parratt, appellant "should be remitted to [state] tort remedies" (455 U.S. at 435). The Court explained that "[i]n Parratt, the Court \* \* \* was dealing with a 'tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure' (id. at 435-436 (citation omitted)). "[I]n contrast," the Court stated, in the case before it "it is the state system itself that destroys a complainant's property interest, by operation of law, whenever

the Commission fails to convene a timely conference -- whether the Commission's action is taken through negligence, maliciousness, or otherwise" (id. at 436). "Unlike the complainant in Parratt," the appellant in Logan was "challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards" (ibid.). The Court concluded that Parratt was not designed to reach such a situation" (ibid.).

Thus, the Logan exception to the rule in Parratt applies only when the deprivation of liberty or property results from systematic action that is fairly attributable to the State. See, e.g., Easter House v. Felder, 852 F.2d 901, 914 (7th Cir. 1988) (Logan applies to "steps taken under a regular routine

that systematically deprive[s] claimants of property without a predeprivation hearing"). A successful claimant under Logan must therefore allege that his injury "is the product of the operation of state law, regulation, or institutionalized practice" (Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985)(en banc), cert. denied, 478 U.S. 1020 (1986), and not simply the action of "an individual [state] officer against whom the plaintiff could have sought relief under state law" (Flower Cab Co. v. Petite, 685 F.2d 192, 195 (7th Cir. 1982)). See, e.g., Brower v. County of Inyo, 817 F.2d 540, 545 (9th Cir. 1987), rev'd on other grounds, 109 S.Ct. 1378 (1989)(upholding claim under Logan where plaintiffs alleged deprivations "pursuant to a policy and procedure" of a county and its sheriff's



department); Sanders v. Kennedy, 794 F.2d 478, 480, 482 (9th Cir. 1986) (upholding claim under Logan where plaintiffs alleged that certain unlawful police practices were performed "pursuant to official policies, practices, and customs of the City of Anaheim, its Chief of Police, and its City Council").

Logan does not control this case. Respondent's confinement without a timely hearing resulted not from an "'established state procedure'" (Logan, 455 U.S. at 436), but rather from the alleged flouting of established state procedure. Here, unlike Logan, the state was fully prepared to provide a predeprivation hearing; it had mandated that such a hearing be provided; and it had even devised sanctions for the willful failure to comply with that mandate. In short, respondent alleged

not a failure of state procedure, but only a failure by state employees to abide by the requirements of state law. Such a claim is foreclosed by Parratt, and is not controlled by Logan.

In their separate concurring opinions, Judges Clark and Anderson reached a different conclusion, but both judges misconstrued the Logan decision. Judge Clark concluded that Logan applies in this case because, in his view, petitioners "were required by state law to secure a due process hearing and were not authorized to detain [respondent] without securing the hearing." (Pet. App. 39-40) Accordingly, he reasoned, "[a]s in Logan, the failure of the Florida officials to arrange for a hearing was a deprivation of an 'established state procedure'" (id. at 40). But the Logan case does not apply



to deprivations of established state procedure; it applies to deprivations resulting from such procedures. Respondent does not and could not contend that Florida procedures themselves deprived him of his rights, only that he was denied the benefit of those procedures by the unauthorized conduct of certain state employees. Logan does not extend to such conduct.

Judge Anderson also found Logan applicable because respondent had alleged that the deprivation of his liberty was effected "'under the color and pretense of the \* \* \* customs or usages of the State of Florida.'" (Pet. App. 49) But the complaint in this case falls far short of alleging the kind of "institutional practice" (Haygood v. Younger, supra, 769 F.2d at 1357) that might constitute an established state

procedure under the Logan rationale. Indeed, neither the majority in the court below, nor the respondent in his pleadings, makes any such claim.

Judge Anderson seemed to infer from Exhibit G to the complaint that FSH had an established procedure of asking patients to sign voluntary consent forms when they were not competent to do so. There is, however, no such allegation in the complaint. Exhibit G was referenced and incorporated in support of the following allegation in Count III:

27. Defendants, and each of them, knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH. See Exhibit G attached<sup>16</sup> hereto and incorporated herein.

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<sup>16</sup> Exhibit G, which is a letter from a state agency to Burch, reports that the hospital's Human Rights Advocacy Committee had discussed the circumstances of his admission with the administration of FSH, and "hospital administration was

The dissent below correctly points out Exhibit G was not incorporated into the complaint to show an established state procedure and it does not reflect such. 840 F.2d at 797 n. 2 (Pet. App. 62). The letter reports that the hospital's Human Rights Advocacy Committee investigated Burch's complaint.<sup>17</sup> At most the letter could be construed as stating that some patients at one hospital had been improperly asked to give

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made aware that they were very likely asking medicated patients to make a decision when they were not mentally competent."

<sup>17</sup> The Committee is a component of the Florida Department of Health and Rehabilitative Services. §20.19(7), Florida Statutes (1983) (App. 102, 104). Its duties include protecting the constitutional and human rights of any client in a facility operated by the Department, and it may investigate and resolve reports of violations of constitutional and human rights. §20.19(7)(a) and (g) (App. 105). It may appeal to the Statewide Human Rights Advocacy Committee any unresolved complaints. (App. 105)

their voluntary consent to admission. The letter does not state that such error was a common practice at FSH or that such incidents reflected state policy in effect at FSH and other institutions. Indeed, the letter is limited to one hospital where only Burch's records were considered. If anything, the letter reflects the State's efforts to adhere to proper procedures.

Having this letter in hand when drafting the complaint, Respondent Burch was not moved to plead any facts or even a conclusory allegation to the effect that his liberty deprivation resulted from an "established state procedure." The Court of Appeals found no reason to rewrite his complaint, and neither should this Court.



### CONCLUSION

The judgment of the Court of Appeals reversing the dismissal of the complaint against petitioners should be reversed. The case should be remanded with instructions to reinstate the judgment for petitioners that was rendered by the district court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

May 5, 1989

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief for Petitioners was served in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in an United States Post Office or mailbox, with first-class postage prepaid, addressed to:

Richard M. Powers, P.A.  
701 Barnett Bank Building  
315 South Calhoun Street  
Tallahassee, Florida 32301

/s/  
LOUIS F. HUBENER



NO. 87-1965

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IN THE SUPREME COURT OF THE  
UNITED STATES  
OCTOBER TERM, 1988

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MARLUS C. ZINERMON, M.D., et al.,

Petitioners,

v.

DARRELL BURCH,

Respondent.

---

On Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

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PETITIONERS' APPENDIX

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CHAPTER 394, FLORIDA STATUTES (1981)

MENTAL HEALTH, PART I

394.451 Short title.-This part shall be known as "The Florida Mental Act" or "The Baker Act."

394.453 Legislative intent.-It is the intent of the Legislature to authorize and direct the Department of Health and Rehabilitative Services to evaluate, research, plan, and recommend to the Governor and the Legislature programs designed to reduce the occurrence, severity, duration, and disabling aspects of mental, emotional, and behavioral disorders. The department is directed to implement and administer mental health programs as authorized and approved by the Legislature, based on the department's annual program budget. It is the further intent of the Legisla-

ture that programs of the department shall coordinate the development, maintenance, and improvement of receiving and community treatment facilities within the programs of the district mental health boards as authorized by the Community Mental Health Act, part IV of this chapter. Treatment programs shall include, but not be limited to, comprehensive health, social, educational, and rehabilitative services to persons requiring intensive short-term and continued treatment in order to encourage them to assume responsibility for their treatment and recovery. It is intended that patients shall be provided with emergency service and temporary detention for evaluation when required; that patients be admitted to treatment facilities on a voluntary basis when extended or continuing care is needed

and unavailable in the community; that involuntary placement be provided only when expert evaluation determines that it is necessary; and that individual dignity and human rights be guaranteed to all persons admitted to mental health facilities. It is further the intent of the Legislature that the least restrictive means of intervention be employed based on the individual needs of each patient within the scope of available services. Nothing in this act shall be construed to affect any policies relating to admission to hospital staff.

394.455 Definitions.-As used in this part, unless the context clearly requires otherwise:

(1) "Hospital" means a public or private hospital or institution or part thereof licensed by the Department of



Health and Rehabilitative Services and equipped to provide inpatient care and treatment facilities, or any hospital under the supervision of the department.

(2) "Mental health professional" means an individual licensed or authorized to practice medicine or osteopathy under the laws of this state who has primarily diagnosed and treated mental and nervous disorders for a period of not less than 3 years, inclusive of psychiatric residency; a clinical psychologist who has not less than 1 year of clinical experience in the diagnosis and treatment of mental and nervous disorders; or, in instances in which individuals having such qualifications are not present at the time and place where mental health services are needed or, if present, do not voluntarily participate in the delivery of mental

health services, a physician licensed pursuant to chapter 458 or chapter 459 who has diagnosed and treated mental and nervous disorders. For the purposes of initiating emergency admissions under s. 394.463(1)(b)3., initiating court-ordered evaluation pursuant to s. 394.463(2)(b)2., and certifying and testifying that a patient manifests criteria for involuntary placement pursuant to the provisions of s. <sup>1</sup>394.467(2)(b)2. and (3)(a), "mental health professional" also means a registered nurse with a masters or doctoral degree in psychiatric nursing and 2 years of post-masters clinical experience under the supervision of a physician possessing the above-stated experience in diagnosis of mental and nervous

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<sup>1</sup> Note.-This cross-reference is erroneous.

disorders. For the purpose of providing services described in this act to patients at facilities operated by the United States Veterans Administration which facilities meet the requirements of receiving and treatment facilities, a physician or psychologist employed by the United States Veterans Administration shall be considered a "mental health professional."

(3) "Mentally ill" means having a mental, emotional, or behavioral disorder which substantially impairs the person's mental health.

(4) "Department" means the Department of Health and Rehabilitative Services.

(5) "Secretary" means the secretary of the Department of Health and Rehabilitative Services.

(6) "Mental health board" means the board within a board district established in accordance with the provisions of the Community Mental Health Act, part IV of this chapter, for the purposes of administering the community mental health program.

(7) "Board district" means that area over which a single mental health board has jurisdiction for administering mental health programs as provided by the Community Mental Health Act, part IV of this chapter, and may consist of one or more services districts.

(8) "Facility" means any state-owned or state-operated hospital or state-aided community facility designated by the department to be utilized for the evaluation, diagnosis, care, treatment, training, or hospitalization of persons who are mentally ill, and any



other hospital within the state approved and designated for such purpose by the department.

(9) "Community facility" means a facility which receives funds from the state under the Community Mental Health Act, part IV of this chapter.

(10) "Receiving facility" means a facility designated by the department to receive patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment, and also means a private facility when rendering services to a private patient pursuant to the provisions of this act.

(11) "Treatment facility" means a state-owned, state-operated, or state-supported hospital, center, or clinic designated by the department for the treatment and hospitalization of persons who are mentally ill, including

facilities of the United States Government, and also means a private facility when rendering services to a private patient pursuant to the provisions of this act. Patients treated in facilities of the United States Government shall be solely those whose care is the responsibility of the Veterans Administration.

(12) "Private facility" means any hospital or facility operated by a nonprofit corporation or association or a proprietary hospital approved by the department.

(13) "Patient" means any mentally ill person who seeks hospitalization under this part, or any person for whom such hospitalization is sought.

(14) "Administrator" means the chief administrative officer of a receiving or treatment facility or his designee.



(15) "Staff member" means any employee of a receiving or treatment facility who has been designated as a staff member by the department.

(16) "Law enforcement officer" means any city police officer, officer of the state highway patrol, sheriff, or deputy sheriff.

(17) "Guardian" means a natural guardian of a minor or a legal guardian appointed by a court to maintain custody and control of the person or of the property of an incompetent.

(18) "Representative" means a person appointed to receive notice of proceedings for and during hospitalization and to take actions for and on behalf of the patient.

(19) "Court" unless otherwise specified, means the circuit court.

(20) "Judge," unless otherwise specified, means the judge of the circuit court or the judge designated to act under this act by the chief judge of a circuit.

(21) "Clinical record" means all parts of the record required to be maintained and includes all medical records, progress notes, charts, admission and discharge data, and all other information recorded by a facility which pertains to the patient's hospitalization and treatment.

(22) "Express and informed consent" means consent voluntarily given in writing after sufficient explanation and disclosure of the subject matter involved to enable the person whose consent is sought to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion.

**394.457 Operation and administration.-**

(1) **ADMINISTRATION.**-The Department of Health and Rehabilitative Services, is designated the "Mental Health Authority" of Florida. The department shall exercise executive and administrative supervision over all mental health facilities, programs, and services.

(2) **RESPONSIBILITIES OF THE DEPARTMENT.** - The department is responsible for the planning, evaluation, and coordination of a complete and comprehensive statewide program of mental health including community services, receiving and treatment facilities, child services, research, and training. The department is also responsible for the implementation of programs and coordination of efforts with other departments

and divisions of the state government, county and municipal governments, and private agencies concerned with and providing mental health services. It is responsible for establishing standards, providing technical assistance, and exercising supervision of mental health programs of state-supported community facilities and other facilities for the mentally ill. It shall stimulate research by public and private agencies, institutions of higher learning, and hospitals in the interest of elimination and amelioration of mental illness. The department may contract for residential and nonresidential services to be provided by receiving and treatment facilities and shall promulgate rules to implement any such services.

(3) **POWER TO CONTRACT.** - The department may contract to provide, and be



provided with, services and facilities in order to carry out its responsibilities under this part with the following agencies: district mental health boards; public and private hospitals; clinics; laboratories; departments, divisions and other units of state government; the state colleges and universities; the community colleges; private colleges and universities; counties, municipalities, and any other governmental unit, including facilities of the United States Government; and any other public or private entity which provides or needs facilities or services. Services contracted for by the department may be reimbursed by the state at a rate up to 100 percent. The department shall make periodic audits and inspections to assure that the contracted services are provided and meet the standards of the department.

(4) APPLICATION FOR AND ACCEPTANCE OF GIFTS AND GRANTS.-The department may apply for, and accept any funds, grants, gifts, or services made available to it by any agency or department of the Federal Government or any other public or private agency or individual in aid of mental health programs. All such moneys shall be deposited in the State Treasury and shall be dispersed as provided by law.

(5) RULES AND REGULATIONS; PERSONNEL.-

(a) The department shall adopt rules and regulations necessary for administration of this part in accordance with the Administrative Procedure Act, chapter 120.

(b) The department shall, by regulation, establish standards of education and experience for professional and



technical personnel employed in mental health programs.

(6) HEARING OFFICERS.-

(a) One or more hearing officers shall be assigned by the Division of Administrative Hearings to conduct hearings for continued involuntary placement.

(b) Hearings on requests for orders authorizing continued involuntary placement filed in accordance with s. 394.467(4) shall be conducted in accordance with the provisions of s. 120.57(1), except that any order entered by the hearing officer shall be final and subject to judicial review in accordance with s. 120.68, except that orders concerning patients committed after successfully pleading not guilty by reason of insanity shall be governed by the provisions of s. 394.467(5).

(7) PAYMENT FOR CARE OF PATIENTS.- Fees and fee collections for patients in treatment facilities shall be according to s. 402.33.

(8) DESIGNATION OF TREATMENT FACILITIES.-Florida State Hospital located at Chattahoochee, Gadsden County; G. Pierce Wood Memorial Hospital located at Arcadia, DeSoto County; South Florida State Hospital located at Hollywood, Broward County; and Northeast Florida State Hospital located at Macclenny, Baker County; and such other facilities as may be established by law or designated by the department in order to ensure availability of the least restrictive environment, including facilities of the United States Government, if such designation is agreed to by the appropriate governing body or authority, are designated as treatment facilities.

(9) DESIGNATION OF APPROVED PRIVATE PSYCHIATRIC FACILITIES.-Private psychiatric facilities may be approved by the department to provide emergency admission, court-ordered evaluation, and treatment on an involuntary basis. Such facilities are authorized to act in the same capacity as receiving and treatment facilities and are subject to all the provisions of this part, except that patients shall have the right to a hearing for continued involuntary placement every 90 days according to established hearing procedures set forth herein.

394.4573 Mental health services plan; case management system; measures of performance; reports.-

(1) The Department of Health and Rehabilitative Services is directed to develop a plan for the provision of

continuity of mental health care, through the provisions of case management, including clients referred from state treatment facilities to community mental health facilities. Such plan shall include the creation of a case management system throughout the state designed to:

(a) Reduce the possibility of a client's admission or readmission to a state treatment facility.

(b) Provide for the creation or designation of an agency in each county to provide single intake services for each person seeking mental health services. Such agency shall provide information and referral services necessary to ensure that clients receive the most appropriate and least restrictive form of care, based on the individual needs of the person seeking treatment. Such



agency shall have a single telephone number, manned 24 hours per day, 7 days per week, where practical, at a central location, where each client will have a central record.

(c) Advocate on behalf of the client to ensure that all appropriate services are afforded to the client in a timely and dignified manner.

(2) The department is directed to develop and include in contracts with the district mental health boards, measures of performance with regard to goals and objectives as specified in the state plan. Such measures shall use, to the extent practical, existing data collection methods and reports and shall not require, as a result of this subsection, additional reports on the part of service providers. The department is also directed to combine, where practi-

cal, reports and reporting requirements with the data requirements of district mental health boards. The department shall plan monitoring visits of community mental health facilities with other state, federal, and local governmental and private agencies charged with monitoring such facilities.

(3) Beginning in 1982, the department is directed to submit a report to the Legislature, prior to April 1 of each year, outlining departmental progress towards the implementation of the minimum staffing patterns' standards in state mental health treatment facilities. The report shall contain, by treatment facility, information regarding goals and objectives and departmental performance toward meeting each such goal and objective.



**349.459 Rights of patients.-**

**(1) RIGHT TO INDIVIDUAL DIGNITY.-**

The policy of the state is that the individual dignity of the patient shall be respected at all times and upon all occasions, including any occasion when the patient is taken into custody, detained, or transported. Procedures, facilities, vehicles, and restraining devices utilized for criminals or those accused of crime shall not be used in connection with the noncriminal mentally ill except for the protection of the patient or others. The noncriminal mentally ill shall not be detained or incarcerated in the jails of this state. In criminal cases, a jail may be used as an emergency facility no longer than 45 days. Treatment shall be provided to the patient by his mental health professional or the receiving facility staff.

No person who is receiving treatment for mental illness in a facility shall be deprived of any constitutional rights. However, if such a person is adjudicated incompetent pursuant to the provisions of this part, his rights may be limited to the same extent the rights of any incompetent person are limited by general law.

**(2) RIGHT TO TREATMENT.-**

(a) The policy of the state is that the department shall not deny treatment for mental illness to any person, and that no services shall be delayed at a receiving or treatment facility because of inability to pay.

(b) It is further the policy of the state that the least restrictive available treatment be utilized based on the individual needs and best interests of the patient.

(c) Each person who is admitted to a receiving or treatment facility, and each person who remains at a facility for a period in excess of 12 hours, shall be given a physical examination by a health practitioner authorized by law to give such examinations within 24 hours after arrival at any such facility.

(3) RIGHT TO EXPRESS AND INFORMED PATIENT CONSENT.-

(a) All persons entering a facility shall be asked to give express and informed consent for treatment after disclosure to the patient if he is competent, or his guardian if he is a minor or is incompetent, of the purpose of the treatment to be provided, the common side effects thereof, alternative treatment modalities, the approximate length of care, and that any consent

given by a patient may be revoked orally or in writing prior to or during the treatment period by the patient or his guardian. If a voluntary patient refuses to consent to or revokes consent for treatment, such patient shall be discharged within 3 days or, in the event the patient meets criteria for involuntary placement, such proceedings shall be instituted within 3 days. If any patient refuses treatment and is not discharged as a result, treatment may be rendered such patient in the least restrictive manner on an emergency basis, upon the written order of a mental health professional when such mental health professional determines treatment is necessary for the safety of the patient or others. If any patient refuses to consent to treatment or revokes consent previously provided, and

if, in the opinion of the patient's mental health professional, the treatment not consented to is essential to appropriate care for such patient hereunder, then the administrator shall immediately petition the hearing examiner for a hearing to determine the competency of the patient to consent to treatment. If the hearing examiner finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate, who shall act on the patient's behalf relating to provision of express and informed consent to treatment. A guardian advocate appointed pursuant to the provisions of this act shall meet the qualifications of a guardian contained in part IV of chapter 744, except that no mental health professional, department employee, or facility administrator shall be appointed.

(b) In addition to the provisions of paragraph (a), in the case of surgical procedures requiring the use of a general anesthetic or electroconvulsive treatment, and prior to performing the procedure, written permission shall be obtained from the patient, if he is legally competent, from the parent or guardian of a minor patient, or from the guardian of an incompetent patient. The facility administrator or his designated representative may, with the concurrence of the patient's attending physician, authorize emergency surgical treatment if such treatment is deemed lifesaving and permission of the patient and his guardian or representative cannot be obtained.

(c) When the department is the legal guardian or representative of a patient, or is the custodian of a pa-



tient whose physician is unwilling to perform surgery based solely on the patient's consent and whose parent or legal guardian is unknown or unlocatable, a court of competent jurisdiction shall hold a hearing to determine the appropriateness of the surgical procedure. The patient shall be physically present, unless the patient's medical condition precludes such presence, represented by counsel, and provided the right and opportunity to be confronted with, and to cross-examine, all witnesses alleging the appropriateness of such procedure. In such proceedings, the burden of proof by clear and convincing evidence shall be on the party alleging the appropriateness of such procedure.

(4) QUALITY OF TREATMENT.-

(a) Each patient in a facility shall receive treatment suited to his needs, which shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. Each patient shall receive such medical, vocational, social, educational, and rehabilitative services as his condition requires to bring about an early return to his community. In order to achieve this goal, the department is directed to coordinate its mental health programs with all other programs of the department.

(b) If a patient is able to secure the services of a private mental health professional, he shall be allowed to see his mental health professional at any reasonable time. In addition, any patient's attending mental health professional may utilize the services of a

consulting mental health professional for the purpose of aiding in evaluation, diagnosis, and treatment. Such consultant may be reimbursed in a manner to be determined by the department within available funds, for services related to this act. The department shall establish rules designed to facilitate examination and treatment by private mental health professionals on a consulting basis.

(5) COMMUNICATION, ABUSE REPORTING, AND VISITS.-

(a) Each patient in a facility has the right to communicate freely and privately with persons outside the facility unless it is determined that such communication is likely to be harmful to the patient or others.

(b) Each patient shall be allowed to receive, send, and mail sealed,

unopened correspondence, and no patient's incoming or outgoing correspondence shall be opened, delayed, held, or censored by the facility unless there is reason to believe that it contains items or substances which may be harmful to the patient or others, in which case the administrator may direct reasonable examination of such mail and may regulate the disposition of such items or substances.

(c) If a patient's right to communicate is restricted by the administrator, written notice of such restriction shall be served on the patient and his guardian or representatives, and such restriction shall be recorded on the patient's clinical record with the reasons therefor. The restriction of a patient's right to communicate shall be reviewed at least every 90 days.

(d) The department shall establish reasonable rules governing visitors, visiting hours, and the use of telephones by patients in the least restrictive possible manner.

(e) Each patient receiving mental health treatment shall have ready access to a telephone in order to report an alleged abuse. The facility staff shall verbally and in writing inform each patient of the procedure for reporting abuse. A written copy of said procedure, including the telephone number of the abuse registry and reporting forms, shall be posted in plain view.

(f) The department shall adopt rules providing a procedure for reporting abuse. Facility staff shall be required, as a condition of employment, to become familiar with the procedures for reporting of abuse.

(6) CARE AND CUSTODY OF PERSONAL EFFECTS OF PATIENTS.-A patient's right to his clothing and personal effects shall be respected. The administrator may take temporary custody of such effects when required for medical and safety reasons. Custody of such personal effects shall be recorded in the patient's clinical record.

(7) VOTING IN PUBLIC ELECTIONS.-A patient in a facility who is eligible to vote according to the laws of the state has the right to vote in the primary and general elections. The department shall establish rules and regulations to enable patients to obtain voter registration forms, applications for absentee ballots, and absentee ballots.

(8) EDUCATION OF CHILDREN.- The department shall provide education and training appropriate to the needs of all



children in treatment facilities. Efforts shall be made to provide this education and training in the least restrictive setting available.

(9) CLINICAL RECORD; CONFIDENTIALITY.-A clinical record for each patient shall be maintained. The record shall include data pertaining to admission and such other information as may be required under rules of the department. Unless waived by express and informed consent by the patient or his guardian or attorney, the privileged and confidential status of the clinical record shall not be lost by either authorized or unauthorized disclosure to any person, organization, or agency. The clinical record shall not be a public record, and no part of it shall be released, except:

(a) The record may be released to mental health professionals, attorneys, and government agencies as designated by the patient, his guardian, or his attorney. A medical discharge summary of the clinical record of any patient committed to, or to be returned to, the Department of Corrections from the Department of Health and Rehabilitative Services shall be released to the Department of Corrections without charge upon its request. The Department of Corrections shall treat such information as confidential and shall not release such information except as provided in this section.

(b) The record shall be produced in response to a subpoena or released to persons authorized by order of court, excluding matters privileged by other provisions of law.

(c) The record or any part thereof may be disclosed to a qualified researcher, a staff member of the facility, or an employee of the department when the administrator of the facility or secretary of the department deems it necessary for treatment of the patient, maintenance of adequate records, compilation of treatment data, or evaluation of programs.

(d) Information from the clinical records may be used for statistical and research purposes if the information is abstracted in such a way as to protect the identity of individuals.

(10) HABEAS CORPUS.-

(a) At any time, and without notice, a person detained by a facility, or a relative, friend, guardian, representative, or attorney on behalf of such person, may petition for a writ of

habeas corpus to question the cause and legality of such detention and request that the circuit court issue a writ for release. Each patient admitted to a facility for involuntary placement shall receive a written notice of the right to petition for a writ of habeas corpus.

(b) A patient or his guardian or representatives may file a petition in the circuit court in the county where the patient is hospitalized alleging that the patient is being unjustly denied a right or privilege granted herein or that a procedure authorized herein is being abused. Upon the filing of such a petition, the circuit court shall have the authority to conduct a judicial inquiry and to issue any appropriate order to correct an abuse of the provisions of this part.

(11) TRANSPORTATION.- If neither the patient nor any person legally obligated or responsible for the patient is able to pay for the expense of transporting the patient to a treatment facility, the governing board of the county from which the patient is hospitalized shall arrange for such required transportation. The department shall promulgate rules and regulations to insure safe and dignified transportation for all patients.

(12) DESIGNATION OF REPRESENTATIVES;  
NOTICE OF ADMISSION.-

(a) At the time a patient is admitted to a facility, the names and addresses of two representatives or one guardian shall be entered in the patient's clinical record.

1. A treatment facility shall give written notice of the patient's admission to his guardian or representatives.

2. A receiving facility shall give notice of admission to the patient's guardian or representatives by telephone or in person within 24 hours.

(b) If the patient has no guardian, he may designate one representative; the second representative, or both in the absence of designation of one representative by the patient, shall be selected by the facility. The first representative selected by the facility shall be made from the following in the order of listing:

1. The patient's spouse;
2. An adult child;
3. Parent;
4. Adult next of kin;
5. Adult friend;
6. Appropriate human rights advocacy committee as defined in s. 20.19; or
7. The department.



The second representative selected by the facility shall be without regard to the order of listing, except that the department shall only be selected as the representative of last resort in cases where the patient is receiving service in a state-operated facility. If the facility can locate only one person from the categories listed above, it shall only be required to select one representative.

(c) The patient shall be consulted with regard to the appointment of a representative and have authority to request that an appointed representative be replaced.

(d) Unless otherwise provided, notice to the patient's guardian or representatives shall be served by registered or certified mail or receipted hand delivery, and the date on

which such notice was mailed shall be entered on the patient's clinical record.

(13) LIABILITY FOR VIOLATIONS. - Any person who violates or abuses any rights or privileges of patients provided by this act shall be liable for damages as determined by law. Any person who acts in good faith in compliance with the provisions of this part shall be immune from civil or criminal liability for his actions in connection with the admission, diagnosis, treatment, or discharge of a patient to or from a facility. However, this section shall not relieve any person from liability if such person is guilty of negligence.

394.460 Rights of mental health professionals.-No mental health pro-

professional shall be required to accept patients for treatment of mental, emotional, or behavioral disorders. Such participation shall be voluntary.

**394.461 Facilities; transfers of patients.-**

(1) RECEIVING FACILITY.-The Department of Health and Rehabilitative Services may designate any community facility as a receiving facility for emergency, short-term treatment and evaluation. The governing board of any county is authorized to contract with the department or with the mental health board of a board district, with the approval of the department to set aside an area of any facility of the department to function, and be designated, as the receiving facility. Any other facility within the state, including a

federal facility, may be so designated by the department at the request of and with the consent of the governing officers of the facility.

(2) TREATMENT FACILITY.-Any state-owned, state-operated, or state-supported facility may be designated by the department as a treatment facility. Any other facility, including a federal facility, may be so designated by the department at the request of, or with the consent of, its governing officers.

(3) TRANSFERS OF PATIENTS.-

(a) Any patient who has been admitted to a treatment or receiving facility on a voluntary basis and is able to pay for treatment in a private facility may apply to the department for transfer at his expense to such private facility. A patient may apply to the department for transfer from a private facility to a

public facility. An involuntary patient may be transferred at the discretion of the department or upon application by the patient or the guardian of said patient.

(b) When the medical needs of the patient or efficient utilization of the facilities of the department require, a patient may be transferred from one facility of the department to another or, with the express and informed consent of the patient and his guardian or representatives, to a facility in another state.

(c) When any patient is to be transferred, notice shall be given to his guardian or representatives prior to the transfer.

(4) CRIMINALLY CHARGED OR CONVICTED MENTALLY ILL PERSONS.-The Florida State Hospital shall not be required to

maintain separate treatment facilities for criminally charged or convicted mentally ill persons.

**394.463 Admission for emergency or evaluation.-**

**(1) EMERGENCY ADMISSION.-**

(a) *Criteria.*-A person may be admitted to a receiving facility on emergency conditions if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injury himself or others if allowed to remain at liberty; or

2. In need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf, and an ex parte order is obtained authorizing the admission.



(b) *Initiation of proceeding.*-An emergency admission may be initiated as follows:

1. A judge may enter an ex parte order stating that a person appears to meet the criteria for emergency admission, giving the findings on which that conclusion is based and directing that a law enforcement officer take the person into custody and deliver him to the nearest receiving facility for emergency examination and treatment. The order of the court shall be made a part of the patient's clinical record; or

2. A law enforcement officer may take a person who appears to meet the criteria for emergency admission into custody and deliver him to the nearest receiving facility for emergency examination and treatment. The officer shall execute a written report detailing the

circumstances under which the person was taken into custody, and the report shall be made a part of the patient's clinical record; or

3. A mental health professional may execute a certificate that he has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for emergency admission, stating the observations upon which that conclusion is based. The mental health professional's certificate shall authorize a law enforcement officer to take the person into custody and deliver him to the nearest available receiving facility for emergency examination and treatment. The law enforcement officer shall execute a written report detailing the circumstances under which the person was taken into custody. The report and mental health profes-

sional's certificate shall be made a part of the patient's clinical record.

(c) *Emergency examination.*-A patient who is admitted for an emergency examination and treatment by a receiving facility shall be examined by a mental health professional without unnecessary delay, and may be given such treatment as is indicated by good medical practice.

(d) *Release of patient.*-At any time the examining mental health professional concludes that the patient need not be retained in a receiving facility or that further evaluation is not necessary, the patient shall be discharged immediately unless the patient is under criminal charges, in which case he shall be returned to the custody of a law enforcement officer. The patient must be released within 48 hours of his admis-

sion except when the examining mental health professional concludes that there is reason to believe that the patient may require evaluation or treatment, in which case, unless the patient voluntarily gives express and informed consent to evaluation or treatment, a proceeding for court-ordered evaluation or involuntary placement shall be initiated.

(2) COURT-ORDERED EVALUATION.-

(a) *Criteria.*-A person may be admitted to, or retained in, a receiving facility for evaluation if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injure himself or others if allowed to remain at liberty; or
2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself

and that such neglect or refusal poses a real and present threat of substantial harm to his well being.

(b) *Initiation of proceeding.*-A court-ordered evaluation may be initiated as follows:

1. Any person may file with the court a petition, executed under oath and supported by affidavits of two additional persons, requesting an evaluation of a person located in the county who is alleged to meet the criteria for a court-ordered evaluation; or

2. Any person may file with the court a petition executed under oath alleging that a person in the county meets the criteria for a court-ordered evaluation. The petition must be accompanied by the certificate of a mental health professional stating that he has examined the patient within the preced-

ing 5 days and has found that the patient may be mentally ill and requires placement in a receiving facility for full evaluation.

(c) *Notice; hearing on petition.*-The judge shall set a hearing on the petition and shall serve notice of the time and place of such hearing on the patient, his guardian, if one has previously been appointed, and the person, if any, having custody and control of the patient. In the absence of a guardian, two other representatives for the service of the notice shall be designated by the court, one of whom, other than the person who filed the petition, shall be selected in the following order:

1. The patient's spouse;
2. An adult child;
3. Parent;
4. Adult next of kin;



5. Adult friend;

6. Appropriate human rights advocacy committee as defined in s. 20.19; or

7. The department.

The second representative shall be selected from the above list without regard to the order of listing, except that the department shall only be selected as the representative of last resort in cases where the patient is receiving services in a state-operated facility. The court shall make such efforts, as in its discretion it determines reasonable in view of the emergency, to contact the persons listed above in the order listed. The court shall notify any other person, including any persons whose names appear in the patient's court file, that the judge believes has a concern for the patient's

welfare. The hearing shall be set within 5 days of the date of mailing the notice with a copy of the petition attached. The court shall grant a continuance upon application by the patient, his guardian, or a representative if such continuance is found necessary to permit preparation for the hearing. The hearing may be waived in writing by the patient. The patient and his guardian or representatives shall be informed of the right to counsel by the judge, and, if the patient cannot afford an attorney to represent him at the hearing, the judge shall appoint one. The patient shall be consulted with regard to the appointment of a representative and have authority to request that an appointed representative be replaced.

(d) *Order for evaluation.*-After a hearing or, if the hearing is waived by express and informed consent of the patient or his guardian, after a review of all evidence, if the judge is satisfied that immediate evaluation is necessary, he shall issue an order to any law enforcement officer, if other less restrictive means are not available, to deliver the patient to a receiving facility for evaluation. If the judge is satisfied that evaluation is necessary, but that the patient need not be retained in a receiving facility immediately for his own safety or that of others, he may order the patient to appear at a designated receiving facility at a specified time within 3 days. If the patient fails to appear at the specified time, the order of the court, countersigned by the administrator of

the facility to show that the person did not appear as ordered, shall authorize and direct any law enforcement officer to take the person into custody and deliver him to the specified receiving facility.

(e) *Evaluation by a receiving facility.*-A patient who is admitted to a receiving facility may be detained for a period not to exceed 5 days. The staff members of all receiving facilities shall encourage patients to apply for voluntary placement if placement appears necessary. Within the 5-day evaluating period one of the following actions shall be taken based on the individual needs of the patient:

1. The patient shall be released;
2. The patient shall be released for outpatient treatment by a community facility;

3. The patient shall give express and informed consent to placement as a voluntary patient; or

4. Proceedings for involuntary placement shall be initiated.

The least restrictive form of treatment shall be made available when determined by a receiving facility mental health professional to be necessary.

(3) DISCHARGE OF PATIENT.-At any time the patient is found not to require retention in a receiving facility for emergency treatment or evaluation, the receiving facility shall discharge the patient unless the patient is under criminal charges, in which case he shall be returned to the custody of a law enforcement officer. Notice of the discharge shall be given to the patient's guardian or representatives, to

any mental health professional who executed a certificate admitting the patient to the receiving facility, and to any court which ordered the patient's evaluation.

#### 394.465 Voluntary admissions.-

##### (1) AUTHORITY TO RECEIVE PATIENTS.-

(a) A facility may receive for observation, diagnosis, or treatment any individual 18 years of age or older making application by express and informed consent for admission or any individual age 17 or under for whom such application is made by his parent or guardian pursuant to s. 394.467. If found to show evidence of mental illness and to be suitable for treatment, such person 18 years of age or older may be admitted to the facility.



(b) A facility may admit for evaluation, diagnosis, or treatment any individual who makes application by express and informed consent therefor; however, any individual age 17 or under may be admitted only after a hearing to verify the voluntariness of the consent. If such individual is under 18 years of age, his parent or guardian may apply for his discharge, and the administrator shall release the patient within 3 days of such application for discharge.

(2) RIGHT OF VOLUNTARY PATIENTS TO DISCHARGE.-

(a) A facility shall discharge a voluntary patient who has sufficiently improved so that retention in the facility is no longer desirable. A patient may also be discharged to the care of a community facility. A voluntary patient or his guardian, representative, or

attorney may request discharge in writing at any time following admission to the facility. This request may be submitted to a member of the staff of the facility for transmittal to the administrator. If the patient, or another on his behalf, makes an oral request for release to a staff member, such request shall be immediately entered in the patient's clinical record, and the patient must within 8 hours be given counseling and assistance in preparing a written request. If a written request is submitted to a staff member, it shall be delivered to the administrator within 16 hours. Within 3 days of delivery of a written request for release to the administrator, the patient must be discharged from the facility or a plan instituted for a discharge of the patient. Such plan shall be approved by

the patient. If the administrator determines that the patient meets the criteria for involuntary placement, proceedings for involuntary placement must be initiated within 3 days of delivery of the written request, exclusive of weekends and legal holidays. If the patient was admitted on his own application and the request for discharge is made by a person other than the patient, the discharge may be conditioned upon the express and informed consent of the patient. If the patient is under the age of 18, his parents or guardian may act for him.

(b) If the administrator, upon the advice of the patient's attending mental health professional, determines that the patient needs to be transferred to a long-term treatment facility and the patient refuses to go as a voluntary pa-

tient, the administrator shall be authorized to file a petition for involuntary placement.

(3) NOTICE OF RIGHT TO RELEASE.-At the time of his admission and each 6 months thereafter, a voluntary patient and his guardian or representatives shall be notified in writing of his right to apply for a discharge.

(4) TRANSFER TO VOLUNTARY STATUS.-Staff members of all treatment facilities shall encourage an involuntary patient to give express and informed consent to transfer to voluntary status unless the patient is under criminal charge, or unless the patient is unable to understand the nature of voluntary placement, or unless voluntary placement would be harmful to the patient, in which case a finding to this effect shall be entered in the patient's clini-

cal record. Any involuntary patient who applies shall be transferred to voluntary status immediately, unless such transfer would not be in the best interest of the patient, in which case such finding shall be entered in the patient's clinical record and shall be subject to review every 90 days. When transfer to voluntary status occurs, notice shall be given to the patient and his guardian or representatives and, if the patient is involuntarily placed under an order of court, to the court which entered such order.

(5) TRANSFER TO INVOLUNTARY STATUS.-A patient who has given express and informed consent to be hospitalized as a voluntary patient, and upon arrival at the treatment facility, refuses to remain as a voluntary patient may be detained by the treatment facility for a

period not to exceed 3 days while the administrator of the treatment facility initiates procedures for involuntary placement.

#### 394.467 Involuntary placement.-

##### (1) CRITERIA.-

(a) A person who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily hospitalized pursuant to such finding if he is mentally ill and, because of his illness, is manifestly dangerous to himself or others.

(b) Any other person may be involuntarily placed if he is mentally ill and, because of his illness, is:

1. Likely to injure himself or others if allowed to remain at liberty, or



2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being.

(2) ADMISSION TO A TREATMENT FACILITY.-A patient may be involuntarily placed in a treatment facility, after notice and hearing, upon recommendation of the administrator of a receiving facility where the patient has been admitted for examination or evaluation. When a patient is not an inpatient in a receiving facility, the administrator of a designated receiving facility may make a recommendation for involuntary placement of a patient who has been given an examination, evaluation, or treatment by staff of the receiving facility or a private mental health professional. The

hearing may be waived by express and informed consent in writing by the patient. The recommendation must be supported by the opinions of two mental health professionals, at least one of whom shall be a physician, who have personally examined the patient within the preceding 5 days that the criteria for involuntary placement are met. Such recommendation shall be entered on an involuntary placement certificate, which certificate shall authorize the receiving facility to retain the patient pending transfer to a treatment facility or completion of a hearing. The certificate shall be filed with the court in the county where the patient is located and shall serve as a petition for a hearing regarding involuntary placement. A copy of the certificate shall also be filed with the department, and copies

shall be served on the patient and his guardian or representatives, accompanied by:

(a) A written notice, in plain and simple language, that the patient or his guardian or representative may apply at any time for a hearing on the issue of the patient's need for involuntary placement if he has previously waived such a hearing.

(b) A petition for such hearing, which requires only the signature of the patient or his guardian or representative for completion.

(c) A written notice that the petition may be filed with a court in the county in which the patient is hospitalized at the time the certificate is executed and the name and address of the judge of such court.

(d) A written notice that the patient or his guardian or representative may apply immediately to the court to have an attorney appointed if the patient cannot afford one.

The petition may be filed in the county in which the patient is involuntarily placed at any time within 6 months of the date of the certificate. The hearing shall be held in the same county, and one of the patient's physicians at the facility shall appear as a witness at the hearing. If the hearing is waived, the court shall order the patient to be transferred to the least restrictive type of treatment facility based on the individual needs of the patient, or, if he is at a treatment facility, that he be retained there. However, the patient can be immediately

transferred to the treatment facility by waiving his hearing without awaiting the court order. The involuntary placement certificate shall serve as authorization for the patient to be transferred to a treatment facility and as authorization for the treatment facility to admit the patient. The treatment facility may retain a patient for a period not to exceed 6 months from the date of admission. If continued involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued involuntary placement.

### (3) PROCEDURE FOR HEARING ON INVOLUNTARY PLACEMENT.-

(a) If the patient does not waive a hearing or if the patient, his guardian, or a representative files a petition for a hearing after having waived it, the judge shall serve notice on the administrator of the facility in which the patient is placed and on the patient. The notice of hearing must specify the date, time, and place of hearing; the basis for detention; and the names of examining mental health professionals and other persons testifying in support of continued detention and the substance of their proposed testimony. The judge may serve notice on the state attorney of the judicial circuit of the county in which the patient is placed, who shall represent the state. The court shall



hold the hearing within 5 days unless a continuance is granted. The patient, his guardian or representative, or the administrator may apply for a change of venue for the convenience of parties or witnesses or because of the condition of the patient. Venue may be ordered changed within the discretion of the court. The patient and his guardian or representative shall be informed of the right to counsel by the court. If the patient cannot afford an attorney, the court shall appoint one. The patient's counsel shall have access to facility records and to facility personnel in defending the patient. One of the mental health professionals who executed the involuntary placement certificate shall be a witness. The patient and his guardian or representative shall be informed by the judge of the right to an

independent expert examination by a mental health professional. If the patient cannot afford a mental health professional, the judge shall appoint one. If the court concludes that the patient meets the criteria for involuntary placement, the judge shall order that the patient be transferred to a treatment facility or, if the patient is at a treatment facility, that he be retained there or that he be treated at any other appropriate facility or service on an involuntary basis. The judge shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the judge finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate who shall act on the patient's behalf relating to the provision of express and

informed consent to treatment. The order shall adequately document the nature and extent of a patient's mental illness. The judge may adjudicate a person incompetent pursuant to the provisions of this act at the hearing on involuntary placement. The treatment facility may accept and retain a patient admitted involuntarily for a period not to exceed 6 months whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness. Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient. If further involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued involuntary placement.

(b) The court shall provide a court order, a psychiatric evaluation, and other adequate documentation of each patient's mental illness to the administrator of a treatment facility whenever a patient is ordered for involuntary placement, whether by civil or criminal court. The administrator of a treatment facility may refuse admission to any patient directed to its facilities on an involuntary basis, whether by civil or by criminal court order, who is not accompanied at the same time by adequate orders and documentation.

(4) PROCEDURE FOR CONTINUED INVOLUNTARY PLACEMENT.-

(a) If continued placement of an involuntary patient is necessary, the administrator shall, prior to the expiration of the period during which



the treatment facility is authorized to retain the patient, request an order authorizing continued involuntary placement. This request shall be accompanied by a statement from the patient's mental health professional justifying the request and a brief summary of the patient's treatment during the time he was involuntarily placed. In addition, the administrator shall submit an individualized plan for the patient for whom it is requesting continued involuntary placement. Notification of this request for retention shall be mailed to the patient and his guardian or representative along with a completed petition, requiring only a signature, for a hearing regarding the continued hospitalization and a waiver-of-hearing form. The waiver-of-hearing form shall require

express and informed consent and shall state that the patient is entitled to a hearing under the law; that he is entitled to be represented by an attorney at the hearing and, if he cannot afford an attorney, that one will be appointed; and that, if it is shown at the hearing that the patient does not meet the criteria for involuntary placement, he is entitled to be released. If the patient or his guardian or representative does not sign the petition, or if the patient does not sign a waiver within 15 days, the hearing officer shall notice a hearing with regard to the patient involved in accordance with s. 120.57(1).

(b) Any time continued involuntary placement is requested, the hearing officer may, on his own motion, notice a hearing.



(c) Any time continued involuntary placement is requested by the administrator, the administrator may request a hearing, and the hearing officer shall hold a hearing within 30 days of such request.

(d) The administrator shall not transfer any patient to voluntary status when he has reasonable cause to believe that the patient is dangerous to himself or others. In any case in which the administrator has reasonable cause to believe that an involuntary patient is dangerous to himself or others, the administrator shall request continued involuntary placement. In any case in which a request for continued involuntary placement is necessary, but the administrator after reviewing the case believes there is not reasonable cause to believe that the patient meets

the criteria for involuntary placement at the time of application for transfer to voluntary status and the patient needs continued placement, the patient shall be transferred to a voluntary status.

(e) If the patient or his guardian or representative returns the signed petition noted in paragraph (a), the hearing officer shall notice a hearing in accordance with s. 120.57(1). The patient and his guardian or representative shall be informed of the right to counsel by the hearing officer. In the event a patient cannot afford counsel in a hearing before a hearing officer, the public defender in the county where the hearing is to be held shall act as attorney for the patient. The hearing shall be conducted in accordance with chapter 120.

(f) If the patient by express and informed consent waives his hearing or if at a hearing it is shown that the patient continues to meet the criteria for involuntary placement, the hearing officer shall sign the order for continued involuntary placement. The treatment facility shall be authorized to retain the patient for a period not to exceed 1 year. The same procedure shall be repeated prior to the expiration of each additional 1-year period the patient is retained.

(g) If continued involuntary placement is necessary for an individual admitted while serving a criminal sentence, but whose sentence is about to expire, or for an individual involuntarily placed while a minor, but who is about to reach the age of 18, the administrator shall petition the hearing

officer for an order authorizing continued involuntary placement.

(h) At any hearing hereunder, the hearing examiner shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the hearing examiner finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate who shall act on the patient's behalf relating to the provision of express and informed consent to treatment. If the hearing examiner finds the patient is competent to consent to treatment, then the patient's competence shall be restored, and any guardian advocate previously appointed shall be discharged.



394.468 Admission and release procedures.-Admission and release procedures and treatment policies of the department are governed solely by this act. Such procedures and policies shall not be subject to control by court procedure rules. The matters within the purview of this act are deemed to be substantive, not procedural.

394.469 Discharge of patients.-

(1) POWER TO DISCHARGE.-At any time a patient is found no longer to meet the criteria for involuntary placement, the administrator may:

(a) Discharge the patient, unless the patient is under a criminal charge, in which case he shall be transferred to the custody of the appropriate law enforcement officer;

(b) Transfer the patient to voluntary status on his own authority or at the patient's request, unless the patient is under criminal charge; or

(c) Place an improved patient, except a patient under a criminal charge, on convalescent status in the care of a community facility.

(2) NOTICE.-Notice of discharge or transfer of status shall be given to the patient, his guardian or representatives, and, if the patient's involuntary placement was by order of a court, the court which entered such order.

(3) CONVALESCENT STATUS; INVOLUNTARY PLACEMENT.-An improved patient may be placed on convalescent status for a period of up to 1 year in the care of a less restrictive community facility when such action is in the best



interest of the patient. Notice of the patient's placement on convalescent status shall be given to the patient and his guardian or representatives, to the community facility, and, if the patient's involuntary placement was by order of a court, to the court which entered the order. Placement on convalescent status shall include provisions for continuing responsibility by a community facility, including a plan for treatment on an outpatient basis. The administrator of the treatment facility from which the patient is given convalescent status may, at any time during the continuance of such convalescent status, return the patient to the treatment facility when the condition of the patient requires. An involuntary patient may be returned for the remainder of his authorized

treatment period, and the treatment facility shall have up to 1 additional month during which to apply for continued involuntary placement.

394.471      Validity of prior involuntary placement orders.-No involuntary placement of a mentally ill person, lawful before January 1, 1972, shall be deemed unlawful because of the enactment of this part. The department shall establish reasonable rules to require the administrator of each treatment facility to apply for an order authorizing continued involuntary placement of any patient for whom involuntary placement is necessary and who was initially involuntarily placed under an order of a court prior to July 1, 1972. Such prior orders, unless superseded by an order under this part,

shall remain valid until July 1, 1973, after which all such orders shall be null and void and of no effect, and every patient retained shall become a voluntary patient unless previously placed on involuntary status pursuant to procedures under this part. Nothing in this part invalidates any order appointing a guardian or determining incompetency.

**394.473 Attorneys' and mental health professionals' fees.-**

(1) In case of indigency of any person for whom an attorney is appointed pursuant to the provisions of this part, the attorney shall be entitled to a reasonable fee to be determined by the circuit judge and paid from the general fund of the county from which the patient was involuntarily detained. In

case of indigency of any such person, the court may appoint a public defender. The public defender shall receive no additional compensation other than that usually paid his office.

(2) When any person who previously retained an attorney is adjudged incompetent, the guardian of such incompetent shall be required to pay a reasonable fee to such attorney retained by the incompetent.

(3) In case of indigency of any person for whom the appearance of a mental health professional is required in a court hearing pursuant to the provisions of this act, the mental health professional, except a mental health professional who is classified as a full-time employee of the state or who is receiving remuneration from the state for his time in attendance at the



hearing, shall be entitled to a reasonable fee to be determined by the court and paid from the general fund of the county from which the patient was involuntarily detained.

394.475 Acceptance, examination, and involuntary placement of Florida residents from out-of-state mental health authorities.-

(1) Upon request of the state mental health authorities of another state, the Department of Health and Rehabilitative Services is authorized to accept as patients, for a period of not more than 15 days, persons who are and have been bona fide residents of Florida for a period of not less than 1 year.

(2) Any person received pursuant to subsection (1) shall be examined by the staff of the state facility where such

patient has been accepted, which examination shall be completed during the said 15-day period.

(3) If upon examination such a person requires continued involuntary placement, a petition for a hearing regarding involuntary placement shall be filed with the circuit judge of the county wherein the treatment facility receiving the patient is located or the county where the patient is a resident.

(4) During the pendency of the examination period herein provided for and the pendency of the involuntary placement proceedings herein provided for, such person may continue to be detained by the treatment facility unless the circuit judge having jurisdiction enters his order to the contrary.



394.477 Residence requirements.-No person shall be involuntarily placed in a facility under the provisions of this part who has not been a bona fide resident of the state continuously for 1 year immediately preceding his involuntary placement. However, any person not a bona fide resident of the state may be involuntarily placed in a treatment facility pending transfer of said person back to the state of his residence. An indigent nonresident patient shall be transferred to the state of his residence at the expense of the county from which he was involuntarily placed. The treatment facility, with the approval of the department, shall retain any nonresident who cannot be transferred subject to the provisions of this part.

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.-

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which

the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

(3) Except for a municipality, the affected agency or subdivision may, at its discretion, request the assistance of the Department of Insurance in the consideration, adjustment, and settlement of any claim under this act.

(4) Subject to the provisions of this section, any state agency or subdivision of the state shall have the right of appealing any award, compromise, settlement, or determination to the court of appropriate jurisdiction.

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its



agencies or subdivisions shall be liable to pay a claim or judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to \$100,000 or \$200,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its

agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974.

(6) An action shall not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing. The failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section. The



provisions of this subsection shall not apply to such claims as may be asserted by counterclaim pursuant to s. 768.14.

(7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality, upon the Department of Insurance, and the department or the agency concerned shall have 30 days within which to plead thereto.

(8) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.

(9)(a) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injuries or damages suffered as a result of any act, event,

or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent of the state or its subdivisions shall be considered an adverse witness in a tort action for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damages suffered as a result of any act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the

constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard for human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(b) As used in this subsection, the term "employee" includes any volunteer firefighter.

(10) Laws allowing the state or its agencies or subdivisions to buy

insurance are still in force and effect and are not restricted in any way by the terms of this act.

(11) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues.

(12) No action may be brought against the state or any of its agencies or subdivisions by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of such riot, unlawful assembly, public demonstration, mob violence, or civil disobedience.



Nothing in this act shall abridge traditional immunities pertaining to statements made in court.

(13) The state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section. Agencies or subdivisions, and sheriffs for the purpose of police professional liability only, which are subject to homogenous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding. Sheriffs may

join together as self-insurers to provide coverage for police professional liability claims only.

(14) This section, as amended by ch. 81-317, Laws of Florida, shall apply only to causes of action which accrue on or after October 1, 1981.

768.30 Effectiveness.-Section 768.28 shall take effect on July 1, 1974, for the executive departments of the state and on January 1, 1975, for all other agencies and subdivisions of the state, and shall apply only to incidents occurring on or after those dates.



284.38 Waiver of sovereign immunity; effect.-The insurance programs developed herein shall provide limits as established by the provisions of s. 768.28 if a tort claim. The limits provided in s. 768.28 shall not apply to a civil rights action arising under 42 U.S.C. § 1983 or similar federal statute. Payment of a pending or future claim or judgment arising under any of said statutes may be made upon this act becoming a law, unless the officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally; however, the fund is authorized to pay all other court-ordered attorney's fees as provided under s. 284.31.

## SECTION 20.19, FLORIDA STATUTES (1983)

20.19 Department of Health and Rehabilitative Services.-There is created a Department of Health and Rehabilitative Services.

\* \* \*

(6) STATEWIDE HUMAN RIGHTS ADVOCACY COMMITTEE.-

(a) There is hereby created within the department a statewide Human Rights Advocacy Committee consisting of the eight citizens who broadly represent the interests of the public and the clients of the department, to be appointed by the Governor. The members shall be representative of four groups of citizens as follows: two elected officials, including one county commissioner; two representatives of agencies or civic groups which are not designated as "federal" or "state"; two representatives from the health and rehabilitative services consumer groups which are currently receiving, or have received, services from the department within the past 2 years; and two residents of the state who do not represent any of the foregoing groups or the department. At least one member of the Human Rights Advocacy Committee shall have served as a member of a district human rights advocacy committee within the 2 years prior to his appointment.

\* \* \*

(f) The responsibilities of the committee shall include, but are not limited to:

1. Serving as a third-party mechanism for protecting the constitutional and human rights of any client within a program or facility operated, funded, or regulated by the department.

2. Receiving, investigating, and resolving reports of abuses or deprivation of constitutional and human rights referred to the Human Rights Advocacy Committee by a district human rights advocacy committee. For the purposes of such investigation, the committee shall have access to all client files and reports when the client is receiving services through, and the files and reports are in the physical custody of, the Department of Health and Rehabilitative Services. In all other cases, the Human Rights Advocacy Committee shall have standing to petition the circuit court for access to client records which are confidential as specified by law. . . .

\* \* \*

6.(g) Procedures for appeal. An appeal to the state committee is made by a district human rights advocacy committee when a valid complaint is not resolved at the district level. The statewide committee may appeal an unresolved complaint to the secretary. If, after exhausting all remedies, the statewide committee is not satisfied that the complaint can be resolved within the department, the appeal may be referred to the Governor.

\* \* \*

## (7) DISTRICT HUMAN RIGHTS ADVOCACY COMMITTEES.-

(a) At least one district human rights advocacy committee is created within each district. The number and areas of responsibility of the district human rights advocacy committees, not to exceed three in any district, shall be determined by the majority vote of district committee members. However, district II may have four committees.

(b) Each district human rights advocacy committee shall have no fewer than 7 and no more than 11 members who shall include at least two consumers, two providers, and two representatives of professional organizations. Priority consideration shall be given to the appointment of at least one medical or osteopathic physician as defined in chapters 458 and 459. Priority consideration shall also be given to the appointment of an individual whose primary interest, experience, or expertise lies with a major departmental client group not represented on the committee at the time of appointment. In no case shall a person who is employed by the department be selected as a member of the committee.

\* \* \*

(g) Each district human rights advocacy committee shall comply with appeal procedures established by the statewide Human Rights Advocacy Committee. The duties, actions, and procedures of both new and existing district or regional human rights advocacy committees shall



conform to the provisions of this act. The duties of each district human rights advocacy committee shall include, but are not limited to:

1. Serving as a third-party mechanism for protecting the constitutional and human rights of any client within a program or facility operated, funded, or regulated by the department.

2. Receiving, investigating, and resolving reports of abuse or deprivation of constitutional and human rights within the area of jurisdiction of the committee. For the purposes of such investigation, the committee shall have access to all client files and reports when the client is receiving services through, and the files and reports are in the physical custody of, the Department of Health and Rehabilitative Services. In all other cases, the Human Rights Advocacy Committee shall have standing to petition the circuit court for access to client records which are confidential as specified by law. . . .

\* \* \*

4. Reviewing existing programs or services and new or revised programs of the department and making recommendations as to how the rights of clients are affected.

5. Appealing to the state committee any complaint unresolved at the district level.

\* \* \*



**PETITIONER'S**

**BRIEF**

(6)

No. 87-1965

Supreme Court, U.S.

FILED

MAY 4 1989

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1988

MARLUS C. ZINERMON, M.D., et al.,

*Petitioners,*

v.

DARRELL BURCH,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT**

**BRIEF FOR PETITIONERS**

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100P2

## QUESTION PRESENTED

Whether the alleged "willful, wanton and reckless" detention of a mentally disturbed person for purposes of treatment without a hearing states a claim for denial of procedural due process under 42 U.S.C. §1983, where the due process deprivation was random, unforeseeable and contrary to state law, and where state law provides adequate postdeprivation remedies.



## **PARTIES TO THE PROCEEDINGS BELOW**

The following is a list of all parties appearing in the proceedings before the United States Court of Appeals for the Eleventh Circuit who are petitioners or respondents before this Court:

### **Petitioners:**

Marlus C. Zinerman, M.D.  
Robert B. Williams  
Janet V. Potter  
Marjorie R. Parker  
James J. Sweet  
Mary Sue McCormick  
Kishorchandra Pandya, M.D.  
Peter K. Chou, M.D.  
Grover Harrison  
Elouise Daniel  
Martha C. Stephens

All of the above named individuals were employees of the Florida State Hospital.

### **Respondent:**

Darrell Burch

Apalachee Community Mental Health Service, Inc., a defendant in the trial court and appellee before the Court of Appeals, is not a party to this proceeding.

## **TABLE OF CONTENTS**

	<i>Page</i>
TABLE OF AUTHORITIES . . . . .	v
OPINIONS BELOW . . . . .	1
JURISDICTION . . . . .	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED . . . . .	2
STATEMENT OF THE CASE . . . . .	3
SUMMARY OF ARGUMENT . . . . .	14
ARGUMENT	
INTRODUCTION . . . . .	16
I. THE ELEVENTH CIRCUIT COURT OF APPEALS ADOPTED AN INCORRECT PROCEDURAL DUE PROCESS ANALYSIS AND FAILED TO BALANCE INDIVIDUAL AND STATE INTERESTS IN DECIDING WHAT PROCESS WAS DUE RESPONDENT BURCH . . . . .	27
A. The Balance of Patient and State Interests and the Inherent Uncertainty as to What Process May be Immediately Due a Mental Patient Require Focus on the Adequacy of State Postdeprivation Remedies . . . . .	20

B. Postdeprivation Remedies Under Florida Law Are Adequate to Provide Burch Due Process . . . . .	25
II. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN <i>PARRATT V. TAYLOR</i> AND RELATED CASES. . . . .	28
A. The Court of Appeals Misapplied This Court's Decisions in <i>Parratt</i> and <i>Hudson</i> . . . . .	28
B. This Court Decided in <i>Ingraham v. Wright</i> That Postdeprivation Remedies Can Provide Adequate Due Process For the Deprivation of a Liberty Interest . . . . .	33
C. This Court's Decision in <i>Logan</i> Does Not Govern The Present Case. . . . .	35
CONCLUSION . . . . .	40
CERTIFICATE OF SERVICE . . . . .	41
APPENDIX . . . . .	A-1

## TABLE OF AUTHORITIES

Cases	Page No.
<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) . . . . .	<i>passim</i>
<i>Armstrong v. Manzo</i> , 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) . . . . .	29
<i>Baker v. McCollan</i> , 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) . . . . .	25
<i>Bonner v. Coughlin</i> , 17 F.2d 1311 (1975), <i>modified, en banc</i> , 45 F.2d 565 (7th Cir. 1976), <i>cert. denied</i> , 435 U.S. 932 (1978) . . . . .	30
<i>Brower v. County of Inyo</i> , 817 F.2d 540 (9th Cir. 1987), <i>rev'd on other grounds</i> , __ U.S. __, 109 S.Ct. 1378, 101 L.Ed.2d 904 (1989) . . . . .	36
<i>Bryant v. School Board of Duval County</i> , 399 So.2d 417 (Fla. 1st DCA 1981), <i>aff'd in part, reversed in part</i> , 417 So.2d 658 (Fla. 1982) . . . . .	27
<i>Burch v. Apalachee Community Mental Health Services, Inc., et al.</i> , 804 F.2d 1549 (11th Cir. 1986), <i>vacated</i> , 812 F.2d 1339 (11th Cir. 1986) . . . . .	1, 7, 8
<i>Burch v. Apalachee Community Mental Health Services, Inc., et al.</i> , 812 F.2d 1339 (11th Cir. 1986) . . . . .	1, 8
<i>Burch v. Apalachee Community Mental Health Services, Inc., et al.</i> , 840 F.2d 797 (11th Cir. 1988) ( <i>en banc</i> ) <i>cert. granted</i> , 57 U.S.L.W. 3582 . . . . .	<i>passim</i>



<i>Daniels v. Williams</i> , 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) . . . . .	<i>passim</i>
<i>Easter House v. Felder</i> , 852 F.2d 901 (7th Cir. 1988) . . . . .	36
<i>Everett v. Florida Institute of Technology</i> , 503 So.2d 1382 (Fla. 5th DCA 1987), appeal dismissed, 511 So.2d 998 (Fla. 1987)* . . . . .	26, 31
<i>Flower Cab Co. v. Petite</i> , 688 F.2d 192 (7th Circuit 1982) . . . . .	36
<i>Harris v. Lewis State Bank</i> , 436 So.2d 338 (Fla. 1st DCA 1983) . . . . .	31
<i>Haygood v. Younger</i> , 769 F.2d 1350 (9th Circuit 1985)(en banc), cert. denied, 478 U.S. 1020 (1986) . . . . .	36, 38
<i>Hewitt v. Helms</i> , 459 U.S. 464, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) . . . . .	18
<i>Hudson v. Palmer</i> , 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) . . . . .	<i>passim</i>
<i>Ingraham v. Wright</i> , 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) . . . . .	<i>passim</i>
<i>Johnson v. Wiener</i> , 155 Fla. 169, 19 So.2d 699 (1944) . . . . .	31
<i>Kentucky v. Graham</i> , 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) . . . . .	27

<i>Kugler v. Helfont</i> , 421 U.S. 117, 95 S.Ct. 24, 44 L.Ed.2d 15, reh. d. n., 421 U.S. 1017, 95 S.Ct. 2425, 44 L.Ed.2d 686 (1975) . . . . .	16
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) . . . . .	<i>passim</i>
<i>Lynch v. Household Finance Corp.</i> , 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424, reh. den., 406 U.S. 911, 92 S.Ct. 161, 31 L.Ed.2d 822 (1972) . . . . .	7, 33
<i>Mann v. City of Tucson</i> , 782 F.2d 790 (9th Cir. 1986) . . . . .	19
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) . . . . .	19, 21, 22
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S.Ct. 893, 47 L.Ed.2d 18 (1972) . . . . .	33
<i>O'Connor v. Donaldson</i> , 422 U.S. 575, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) . . . . .	18
<i>Parham v. J.R.</i> , 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) . . . . .	<i>passim</i>
<i>Parratt v. Taylor</i> , 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) . . . . .	<i>passim</i>
<i>Sanders v. Kennedy</i> , 794 F.2d 472 (9th Cir. 1986) . . . . .	36
<i>Youngberg v. Romeo</i> , 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) . . . . .	21, 27



## Constitution, Statutes, and Rules

### United States Constitution

Amendment XIV . . . . . *passim*

### United States Code Annotated:

28 U.S.C. §1254(1) . . . . . 1

42 U.S.C. §§1981-1988 . . . . . 33

42 U.S.C. §1983 . . . . . *passim*

42 U.S.C. §2101(c) . . . . . 1

### Florida Statutes

#### Chapter 20 (1983)

§20.19 . . . . . 39

#### Chapter 284 (1981)

§284.38 . . . . . 27

#### Chapter 394, Part I . . . . . *passim*

§394.453 . . . . . 10

§394.455(22) . . . . . 11

§394.459(2) . . . . . 25

§394.459(3)(a) . . . . . 10, 24

§394.459(10) . . . . . 13

§394.459(12) . . . . . 11

§394.459(13) . . . . . 13, 26, 28, 31

§394.463 . . . . . 31

§394.465(2) . . . . . 11, 24

§394.465(3) . . . . . 11, 24

§394.467 . . . . . 19, 30

§394.467(1)(b) . . . . . 12

§394.467(2) . . . . . 13

§394.467(2)(a-d) . . . . . 12

§394.467(3) . . . . . 12, 26

#### Chapter 768 (1981)

§768.28 . . . . . 2, 14, 25, 28

§728.28(1) . . . . . 31

§768.28(5) . . . . . 14, 26

§768.28(9) . . . . . 27

§768.30 . . . . . 14, 26

#### Chapter 394 (Supp. 1982)

§394.463(2)(b) . . . . . 12

### Federal Rules of Civil Procedure

Rule 12(b)(6) . . . . . 6

Rule 56 . . . . . 6

### Supreme Court Rules

Rule 20 . . . . . 1

## Articles

Albers, Pasewark and Meyer, *Involuntary  
Hospitalization and Psychiatric Testimony:  
The Fallibility of the Doctrine of Immaculate  
Perception*, 6 Cap.L.Rev. 11 (1976) . . . . .21

*Due Process and the Development of  
"Criminal" Safeguards in Civil Commitment  
Adjudication*, 42 Ford.L.Rev. 611(1974) . . . . .21

## BRIEF FOR PETITIONERS

### OPINIONS BELOW

The March 18, 1988, *en banc* decision of the United States Court of Appeals for the Eleventh Circuit reversing the district court is reported at 840 F.2d 797. (Pet. App. 1) The order granting rehearing *en banc* and vacating the panel opinion is reported at 812 F.2d 1339. (Pet. App. 98) The panel decision of the Court of Appeals affirming the District Court is reported at 804 F.2d 1549. (Pet. App. 100)

The opinion and judgment of the United States District Court for the Northern District of Florida is not reported. (Pet. App. 134)

### JURISDICTION

The *en banc* decision of the Court of Appeals was entered on March 18, 1988. The petition for a writ of certiorari was filed and docketed within the period established by Supreme Court Rule 20 and 28 U.S.C. §2101(c). The Court granted the petition on March 6, 1989. 57 U.S.L.W. 3582.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV provides in pertinent part:

Section I... nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The Civil Rights Act of 1871 (42 U.S.C. §1983) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. . . .

The "Florida Mental Health Act," also known as "The Baker Act," Chapter 394, Part I, Florida Statutes (1981), is set forth in the appendix to this brief (App. 1)

Section 768.28, Florida Statutes (1981), a state waiver of sovereign immunity in tort, is set forth in the appendix to this brief. (App. 38)

## STATEMENT OF THE CASE

Respondent Darrell Burch filed this action under 42 U.S.C. §1983 against Apalachee Community Mental Health Services, Inc. ("ACMHS"), a community mental health facility in Tallahassee, Florida, and eleven named employees of the Florida State Hospital, a state treatment facility for the mentally ill.<sup>1</sup> Burch sought damages for the alleged denial of his Fourteenth Amendment procedural due process rights during the course of his admission to and stay at both facilities.

### A. Background Facts.

Burch was taken to ACMHS on December 7, 1981, by a concerned citizen who found him wandering along a highway. Looking at the medical records attached to and incorporated in the complaint, the *en banc* decision below states that:

Upon his arrival, Burch was hallucinating, confused, disoriented, and clearly psychotic, was wearing no shoes, and believed that he was in heaven. At the request of ACMHS, Burch signed a form for voluntary admission and a form for authorization for treatment.

*Burch v. Apalachee Community Mental Health Services, Inc.*, 840 F.2d 797, 799 (11th Cir. 1988)(*en banc*)(Pet. App.4).

Burch remained at ACMHS for three days, during which time ACMHS diagnosed his condition as paranoid schizo-

<sup>1</sup> Apalachee Community Mental Health Services, Inc., is a public facility designated by the State as capable of receiving patients suffering from mental illnesses. It did not petition this Court for certiorari and is not a party to this proceeding.



phrenia and administered psychotropic drugs (Pet. App. 5). Because ACMHS could not provide the treatment Burch needed, he was transferred to Florida State Hospital ("FSH") on December 10, 1981. (*Id.*)

While at ACMHS, Burch signed a form requesting voluntary admission to FSH and another authorizing treatment. (R 10, 11; Complaint Exs. A-1, A-2) On arrival at FSH, Burch signed forms for voluntary admission and treatment. (R 14, 15; Exs. C-1, C-2) On December 23, 1981, he signed another form for authorization of treatment. (R 21; Ex. E-5) Records attached to the complaint indicate that Burch reported using marijuana, mushrooms, and hash, and was suffering hallucinations at the time of his admission.<sup>2</sup> Burch remained a patient at FSH until May 7, 1982, when he was released. During this time, no hearing was held with respect to Burch's placement and treatment. (*Id.* at 6)

## B. The Complaint.

In February, 1985, Burch filed his complaint in the federal District Court for the Northern District of Florida seeking damages under 42 U.S.C. §1983. (Pet. App. 201, *et seq.*) Count III of the complaint was directed at the eleven named employees of FSH. In substance, Count III alleged:

1. Defendants knew or should have known that Burch was incapable of voluntary, informed consent to admission and treatment. (Pet. App. 201)
2. Defendants confined and imprisoned Burch and

<sup>2</sup> (R 26; Ex. F-5) The same records also indicate that on admission to FSH, Burch suffered from a possible nose fracture and bruises on his chest, was incontinent of urine and had dried blood on his chest, feet, nails and mandible. (R 22, 24, 26; Exs. F-1, F-3 and F-5 to complaint.)

subjected him to involuntary commitment and treatment from December 10, 1981, to May 7, 1982. (*Id.*)

3. Burch was without benefit of counsel and no hearing was held to challenge his "involuntary admission and treatment." (*Id.* at 202)

4. Defendants deprived Burch of his liberty without due process of law in contravention of the Fourteenth Amendment. (*Id.*)

5. Defendants "acted with willful, wanton and reckless disregard of and indifference to Plaintiff's constitutionally guaranteed right to due process of law. Plaintiff has been and continues to be substantially damaged by the aforesaid acts of Defendants." (*Id.*)

### C. Rulings Below.

Defendants filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P., asserting the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion and dismissed the complaint.<sup>3</sup> In dismissing the complaint, the District Court relied primarily on *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984).<sup>4</sup> That court reasoned that the failure of the staff of FSH to follow the involuntary placement procedures prescribed by Florida law made it "impracticable, if indeed not impossible, to provide [other] adequate predeprivation process to the plaintiff." (Pet. App. 139) The District Court found that Florida's statutory procedures regarding voluntary and involuntary placement were adequate to insure due process of law and further that Florida law provided adequate postdeprivation due process in the form of an action for damages. (*Id.*)

A panel of the Court of Appeals affirmed the District Court decision. *Burch v. Apalachee Community Mental Health*

<sup>3</sup> Although the order of the District Court clearly considered the medical records attached as exhibits to the complaint, the order did not by its terms treat the defendants' motion as one for summary judgment under Rule 56, Fed.R.Civ.P. However, Rule 12(b)(6) provides that if matters outside the pleadings are presented to the court, the motion shall be treated and disposed of as provided in Rule 56. The complaint purports to incorporate within it the attached medical records. Apparently the District Court did not consider these "outside the pleadings."

<sup>4</sup> *Parratt* held that the negligent loss of a prisoner's hobbykit by prison officials who had failed to follow established procedures for handling mail did not state a claim for relief under 42 U.S.C. §1983 when adequate state procedures existed whereby the prisoner could be compensated. *Hudson* held that even the intentional deprivation of a prisoner's property by a random, unauthorized act of a state employee likewise stated no claim if a meaningful postdeprivation remedy were available to the prisoner.

*Services, Inc., et al.*, 804 F.2d 1549 (11th Cir. 1986)(Pet. App. 100). Reviewing the complaint, the panel opinion concluded that:

Burch has not alleged that Florida statutory procedures were constitutionally inadequate; nor has he made a colorable claim that the governing boards of ACMHS or FSH had a policy, custom or regular practice of not following the mandated procedure.

804 F.2d at 1556 (Pet. App. 127).

Taking the allegations of the complaint as true, the decision stated that "we cannot doubt that [Burch] has a colorable claim that the defendants failed to follow the [state] statutory procedure." *Id.* at 1552 (Pet. App. 106). The panel read the complaint as alleging no more than that the defendants "by willfully confining and treating [Burch] without a valid consent, deprived him of his procedural due process right to a judicial hearing." *Id.* at 1553 (Pet. App. 111).

In these circumstances, the panel opinion found the logic of *Parratt* and *Hudson* controlling and held on the basis of *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), that the alleged deprivation of procedural due process should be analyzed in an identical fashion regardless of whether the deprivation affected liberty or property. It noted that its analysis was harmonious with that of *Ingraham v. Wright*, 430 U.S. 651 (1977), involving the alleged deprivation of a liberty interest in the context of corporal punishment administered without prior notice or hearing in public school systems. (Pet. App. 125)

The panel concluded that the State could not predict that FSH employees would ignore state law and thus, as in



*Parratt* and *Hudson*, it could not "establish any type of predeprivation hearing, beyond that provided by the statutory commitment procedures, to protect Burch from random and unauthorized acts." 804 F.2d at 1556 (Pet. App. 128). Finding Florida's postdeprivation tort remedies adequate, the panel affirmed that Burch had stated no claim for relief under 42 U.S.C. §1983.

The Court of Appeals then granted rehearing *en banc*, vacating the panel decision. 812 F.2d 1339 (Pet. App. 98). On rehearing *en banc*, eight judges of the court agreed that the complaint stated a procedural due process claim for relief. 840 F.2d 797 (Pet. App. 1). Five judges dissented. *Id.* at 810 (Pet. App. 56). In addition, of the eight member majority, five specifically concurred in an opinion stating that Burch had also raised a claim for a substantive due process violation and should be permitted to amend his pleadings accordingly. *Id.* at 803 (Pet. App. 27).<sup>5</sup>

The plurality opinion reasoned that the rationale of *Parratt* applies only when the random and unauthorized conduct was that of a state actor who *lacked* authority from the State to deprive persons of constitutionally protected interests. Because FSH employees had authority to deprive Burch of his liberty, they — and therefore the State — were in a position to provide for predeprivation due process. 840 F.2d at 802 n. 10 (Pet. App. 19). Hence, because "predeprivation procedures were practicable . . . postdeprivation remedies cannot provide due process." *Id.* at 801 (Pet. App. 18). The predeprivation hearing was practicable "because the appellees had both the ability to predict that one was re-

<sup>5</sup> In addition, Judge Clark filed a concurring opinion (Pet. App. 32), and Judge Anderson, joined by Judge Godbold, filed a specially concurring opinion (Pet. App. 47).

quired *and* the duty because of their state-clothed authority to provide one." *Id.* at 802 (Pet. App. 19).

As to Burch's complaint, the plurality opinion of the Court of Appeals stated that:

In the present case, Burch has alleged that the appellees "willful[ly], wanton[ly] and [with] reckless disregard" deprived him of his liberty without due process of law by having him sign forms for voluntary admission and treatment when he was not competent to do so. Although we are mindful that plaintiffs cannot simply invoke such talismanic allegations to escape *Daniels'* reach [*Daniels v. Williams*, 474 U.S. 327 (1986)], we hold that Burch has alleged a deprivation in the constitutional sense. . . . Burch's deprivation of liberty stems from the abuse of power that the Due Process Clause and Section 1983 seek to deter.

*Id.* at 802 (Pet. App. 22).

In *Daniels v. Williams*, 474 U.S. 327 (1986), this Court partially overruled *Parratt* "to the extent that [*Parratt*] states mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." *Id.* at 330, 331. The *en banc* decision found that *Daniels'* analysis did not require dismissal of the complaint because Burch did not allege that the defendants' negligence deprived him of his liberty. 840 F.2d at 800 n. 6 (Pet. App. 9). It further stated that the "state officials" at FSH had "abused their state-clothed power," thus distinguishing Burch's claim from other §1983 cases "seeking recovery based upon mere torts of state officials." 840 F.2d at 803 n. 12 (Pet. App. 26). Therefore, although both the District Court and the panel decision had found Florida's



postdeprivation remedies adequate, the *en banc* decision did not find it necessary to review them.

#### D. Florida's Statutory Scheme for Placement of the Mentally Ill.

The Florida law in effect now and at the time of Burch's admission and treatment is known as "The Florida Mental Health Act" or "The Baker Act."<sup>6</sup> Section 394.453, Florida Statutes (1981), provides in part that:

It is intended that patients shall be provided with emergency service and temporary detention for evaluation when required; *that patients be admitted to treatment facilities on a voluntary basis when extended or continuing care is needed and unavailable in the community*; that involuntary placement be provided only when expert evaluation determines that it is necessary, and that individual dignity and human rights be guaranteed to all persons admitted to mental health facilities. (Emphasis supplied.) (App. 1)

#### 1. Voluntary Placement.

A patient entering a facility is asked to give "express and informed consent" to treatment. See §394.459(3)(a) (App. 11). "Express and informed consent" is defined as:

[C]onsent voluntarily given in writing after sufficient explanation and disclosure of the subject

<sup>6</sup> Chapter 394, Part I, Florida Statutes (1981). All pertinent sections of the 1981 statutes are set out in their entirety in the appendix to this brief. (App. 1, *et seq.*)

matter involved to enable the person whose consent is sought to make a knowing and willful decision without any fraud, deceit, duress, or any other form of constraint or coercion.

§394.455(22), Florida Statutes (1981) (App. 5). If a voluntary patient refuses his consent or revokes consent, he is to be discharged or, in the alternative, proceedings for involuntary placement begun. §394.459(3)(a) (App. 11). If the treatment refused or revoked is deemed essential to appropriate care, the facility administrator may initiate administrative proceedings for appointment of a guardian advocate to act on the patient's behalf relating to provision of express and informed consent. *Id.*

Whenever a patient is admitted to a facility, written notice must be given his legal guardian or representative. If the patient has no legal guardian, he is entitled to the appointment of two representatives.<sup>7</sup> §394.459(12) (App. 17). At the time of admission and every six months thereafter, the voluntary patient *and* his guardian or representative must be given written notice of the patient's right to discharge. §394.465(3) (App. 27)

The guardian or representative of a voluntary patient may request his discharge in writing at any time. §394.465(2) (App. 26). The voluntary patient also may make a written or oral request for discharge at any time. *Id.* If oral, he must be given assistance in preparing a written request. The administrator must then discharge the patient within three days or initiate proceedings for involuntary placement. *Id.*

<sup>7</sup> At least one representative was appointed for Burch on December 11, 1981. See R 20, Ex. E-4 to Complaint.

A person may be admitted to a receiving facility on an emergency basis. In 1981, a person so admitted had to be released within 48 hours unless he gave express and informed consent to further evaluation and treatment or involuntary placement proceedings were initiated. §394.463, Florida Statutes (1981)(App. 21).<sup>8</sup>

## 2. Involuntary Placement.

A person may be placed in a treatment facility on an involuntary basis if he is mentally ill and, because of the illness, is:

1. Likely to injure himself or others if allowed to remain at liberty, or
2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being.

§394.467(1)(b), Florida Statutes (1981) (App. 28).

Involuntary placement requires a judicial proceeding with substantial notice requirements to the patient or his guardian or representative. §394.467(2)(a-d) and (3) (App. 29, 30). The person has a right to an attorney and to examination by an independent mental health expert. §394.467(3) (App. 30). If the patient is not competent to consent to treatment, the court must appoint a guardian advocate to act on the patient's behalf relating to provision of informed consent. *Id.*

<sup>8</sup> A mental patient now may be detained on an emergency basis for up to 72 hours. §394.463(2)(b), Florida Statutes (Supp. 1982).

The facility may retain an involuntary patient for up to six months, at which point it must seek an order from an administrative hearing officer authorizing continued placement. §394.467(2) (App. 30).

## E. Remedies Under Florida Law.

Pursuant to §768.28, Florida Statutes (1981), Florida waived sovereign immunity in tort. (App. 38) The waiver became effective in 1974 and 1975. §768.30, Florida Statutes (1981) (App. 42). The waiver provided for a limitation of \$100,000.00 on the amount of damages an individual may recover. §768.28(5), Florida Statutes (1981) (App. 39).

Section 394.459(13), Florida Statutes (1981) (App. 18), recognizes a cause of action for damages against a person who violates or abuses the rights or privileges provided patients under the Baker Act. The statute provides immunity for acts taken in good faith but does not relieve a person from liability for acts of negligence. *Id.*

A patient, friend, relative, guardian, representative, or attorney may question the patient's detention under the Baker Act by habeas corpus proceedings. §394.459(10), Florida Statutes (1981) (App. 16). The patient, his guardian or representative may also challenge the abuse of any procedure authorized by the Baker Act or the denial of any right or privilege granted by the Act. *Id.*



### SUMMARY OF ARGUMENT

The issue here is whether the Respondent's complaint states a claim for relief under 42 U.S.C. §1983. Burch alleges that when taken to FSH he was unable to give his informed consent to admission and treatment, and that petitioners "willfully, wantonly and recklessly" deprived him of a hearing required for involuntary placement at FSH. The allegations of the complaint and medical records attached thereto make it clear that respondent was severely disturbed and in need of psychiatric treatment.

The petitioners contend that Burch has no claim for relief cognizable under §1983 because state remedies are adequate to provide him complete due process. The appropriate due process analysis cannot be separated from the context of this case — care and treatment of the mentally ill. In deciding exactly what process is due Burch, the past decisions of this Court require a balancing of the mental patient's interests, the State's interests, the protections afforded by established state procedures, and the value or burden of additional procedures or safeguards. Florida law provides more than adequate procedures and remedies, and, therefore, consistent with this Court's analysis in *Ingraham v. Wright*, 430 U.S. 651 (1977), Burch has no claim for damages cognizable under §1983.

The Court of Appeals failed to undertake the above due process analysis. It briefly adverted to countervailing interests of the State and the Respondent but failed to weigh and balance those interests. Instead, it held that petitioners' actions were an abuse of their state-clothed authority and therefore actionable under §1983. The court's analysis completely ignores the medical and psychiatric context of this case and the uncertain nature of psychiatric diagnosis that this Court has repeatedly recognized. It is that very uncer-

tainty that compels a balancing of patient and State interests and consideration of state remedies for erroneous decisions or wrongful acts. If mental health professionals are subject to unlimited liability under §1983 for misjudgments as to competency, the State necessarily will be reluctant to accept voluntary patients. As a result, more resources will be devoted to hearings, treatment will be delayed and fewer mentally ill persons may seek state care. The Court of Appeals erred in failing to consider the adequacy of Florida remedies.

Because the complaint alleges that the deprivation of Burch's liberty interest was occasioned by unforeseeable acts rather than an established state procedure, this Court's decisions in *Parratt* and *Hudson* likewise compel examination of state remedies to determine whether the State affords complete due process. The due process analysis applied to property interests violated by the State can also apply to liberty interests. See *Ingraham v. Wright*, *supra*. Because Florida provides remedies that afford complete due process, Burch's claim is not actionable under §1983.

The unsupported allegation that petitioners acted willfully, wantonly and recklessly does not suffice to state a claim for relief under §1983. In the absence of appropriate allegations, the Court of Appeals erred in attempting to distinguish this case on the ground that petitioners abused their "state-clothed" authority. Their acts, even if willful, are not different in kind from that of a teacher who, having state-clothed authority, paddles a child and causes injury, see *Ingraham*, *supra*, or from that of a prison official who, with state-clothed authority, searches a cell and intentionally destroys a prisoner's property. See *Hudson v. Palmer*, 468 U.S. 517 (1984). In either event, the Court has held that such misuse of authority is not actionable under §1983.



where state remedies are adequate to afford complete due process.

Burch was not deprived of a liberty interest by the operation of an established state procedure but by the failure to observe established state procedures. Because those procedures did not cause the deprivation, this case is not controlled by *Logan v. Zimmerman Brush Co.*, 455 U.S. at 422 (1982).

## ARGUMENT

### Introduction

There can be no doubt that Respondent Burch was acutely in need of medical and psychiatric treatment when brought to Florida State Hospital on December 10, 1981. Burch has never contended otherwise in the course of these proceedings or disputed the diagnosis of his condition as paranoid schizophrenia.

The complaint presents a claim for damages for the deprivation of liberty without due process of law. In considering the correctness of dismissal for failure to state a claim, the allegations of the complaint are to be taken as true. *Kugler v. Helfont*, 421 U.S. 122, 125 (1975). Hence, it must be taken as fact that Burch was unable to give his informed consent to admission and treatment and that he had no judicial hearing. The plurality opinion of the Court of Appeals attached no "talismanic" significance to the terms "willful, wanton and reckless," merely observing that having Burch sign forms for voluntary admission and treatment when he was not competent to do so was "an abuse of power that the

Due Process Clause and Section 1983 seek to deter." 840 F.2d at 802. The plurality opinion concluded that:

[T]aking Burch's allegations as true, his procedural due process rights were violated after he was committed beyond forty-eight hours without a hearing.

840 F.2d at 802 (Pet. App. 20).

No matter whether viewed in terms of "willfulness" or "abuse of power," Burch's complaint questions his competency to give informed consent to admission and treatment and the petitioners' judgment of his ability to give that consent. Petitioners strongly take issue with the conclusion that a misjudgment of Burch's competency, and the bare allegation that he was willfully confined, state a claim for relief under §1983 without regard to whether remedies under Florida law provide all the process that Burch may be constitutionally due.

### I. THE ELEVENTH CIRCUIT COURT OF APPEALS ADOPTED AN INCORRECT PROCEDURAL DUE PROCESS ANALYSIS AND FAILED TO BALANCE INDIVIDUAL AND STATE INTERESTS IN DECIDING WHAT PROCESS WAS DUE RESPONDENT BURCH.

If Burch was unable to give informed consent to admission and treatment at FSH, he was entitled to a hearing before involuntary placement in that institution under both the Fourteenth Amendment and applicable state law. *See Ad-*

*dington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 575 (1975); §394.467, Florida Statutes (1981) (Pet. App. 63).<sup>9</sup> There is no question, however, but that the State may confine a mentally ill person if appropriate procedural due process is afforded. *Addington, supra*. In this case, taking the allegations of the complaint as true, the requisite hearing was not afforded.<sup>10</sup>

This acknowledgment only begins the due process inquiry, however, and the fact that no hearing was held does not alone suffice to state a claim under 1983. Even though a liberty interest is here at issue, the State submits that under this Court's recent decisions a determination of whether the deprivation was "without due process" necessarily involves consideration of the adequacy of state remedies. See *Parratt v. Taylor*, 451 U.S. 527 (1981)(negligent loss of inmate's property by prison officials); *Hudson v. Palmer*, 468 U.S. 517 (1984)(intentional destruction of inmate's personal property); *Ingraham v. Wright*, 430 U.S. 651 (1977)(corporal punishment causing injury to public school students administered without prior hearing).

This case closely parallels *Ingraham, supra*, in which the plaintiffs sought damages for corporal punishment and, in addition, injunctive relief against state laws and policies permitting such punishment. Although Burch seeks only damages for a single due process violation, this suit, calling

<sup>9</sup> Liberty interests protected by the Fourteenth Amendment may arise from the Due Process Clause itself and the laws of the States. *Hewitt v. Helms*, 459 U.S. 464, 466 (1983).

<sup>10</sup> Burch's brief in opposition to the petition for certiorari acknowledges that the issue before the Court involves a question of procedural due process, not substantive, saying "since this case was decided on procedural due process grounds, this is not the appropriate case in which to clarify substantive due process issues." Br. in Opp. at 3.

into question a medical and psychiatric judgment on his ability to give informed consent, is in effect an indirect attack upon Florida's voluntary placement procedures. Those procedures seek to facilitate treatment of disturbed persons on a voluntary basis, an approach which benefits the patient and the State. Thus, as in *Ingraham*, the appropriate due process analysis requires a balancing of the individual's and the State's interests.

This being so, it is probably not necessary in this case to establish the brightline rule that the *Parratt* and *Hudson* analysis extends to *all* unforeseeable deprivations of liberty.<sup>11</sup> The due process analysis in *Ingraham* did not reason that where a procedural due process interest is implicated, the single and automatic inquiry is the adequacy of state remedies to afford the complete process due. To identify "the specific dictates of due process," *Ingraham* relied on the approach set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), considering and balancing three factors: (1) the private interest of the individual affected by the state action; (2) the risk of erroneous deprivation of the interest and the probable value of additional or substitute safeguards; and (3) the government's interest, including the function involved, and the fiscal and administrative burdens additional or substitute procedural requirements would entail. *Ingraham, supra*, at 675. This analysis is particularly appropriate in the problematic universe of psychiatric diagnosis. The due process analysis cannot be divorced from the con-

<sup>11</sup> This has been suggested in *Mann v. City of Tucson*, 782 F.2d 790, 794 (9th Cir. 1986)(Judge Sneed concurring). Judge Sneed, reviewing the *Parratt*, *Hudson* and *Daniels* trilogy, suggests that the *Parratt* analysis could embrace "all unforeseeable deprivations of life, liberty and property," the justification being that the state by its conduct has not forfeited its opportunity to provide a remedy and "Parratt's application would remove from federal courts many fairly simple 'tort' cases." *Id.* at 798.



text in which the case arises or from the ultimate decision — the medical judgment — that is made. *Parham v. J.R.*, 442 U.S. 584, 608 (1979). Here, the Court of Appeals gave no consideration whatever to that context or to the Florida laws which could rectify any wrong committed. Instead, the Court of Appeals rendered a narrow and strained interpretation of the *Parratt* and *Hudson* due process analysis. Although the court briefly alluded to the countervailing individual and State interests, it failed to weigh and balance the interests as this Court has done when considering the rights of the mentally ill in the care of the State. See 840 F.2d at 800 (Pet. App. 12).

**A. The Balance Of Patient and State Interests and the Inherent Uncertainty as to What Process May be Immediately Due a Mental Patient Require Focus on the Adequacy of State Postdeprivation Remedies.**

The interest of the State in providing care to mentally disturbed persons who are unable to care for themselves cannot be questioned. See *Addington v. Texas*, 441 U.S. 418 (1979). But in the world of the disturbed, there is seldom, if ever, any sharp distinction between those who can comprehend their condition and needs, and therefore validly consent to treatment, and those who cannot. "The subtleties and nuances of psychiatric diagnosis render certainties beyond reach in most situations," and it is "very difficult for the expert physician to offer definite conclusions about any particular patient." *Id.* at 430.

The fact that we take as true the allegation that Burch was unable to give informed consent does not control the analysis and outcome of this case. The Court has empha-

sized precisely this point in considering the rights of mentally disturbed children subject to commitment for institutional care:

[I]t bears repeating that procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.

*Parham v. J.R.*, 442 U.S. at 613 and 615 (1979), quoting from *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Due process rules must take into account the doubt and nuance of the psychiatric judgment, not the easy certainty of the legal allegation, for "[w]hat process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made." *Parham, supra*, at 608.

In the generality of cases, whether a disturbed person can give informed consent will nearly always be open to question. The validity of any mental patient's consent — and therefore the need for a judicial hearing — is inherently uncertain.<sup>12</sup> The process due the mental patient in these circumstances must therefore consider and balance the interests of both the patient and the State. See *Addington, supra*, at 426; *Parham, supra*, at 599-600; *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). State procedures must protect the rights of the individual "without unduly burdening legitimate efforts . . . to deal with difficult social problems." *Parham, supra*, at 608 n. 16. This analysis leads ineluctably to the conclusion that the due process inquiry

<sup>12</sup> It is generally recognized that "there is no justification for the assumption that mental illness always destroys judgment." Note, *Due Process and the Development of "Criminal" Safeguards in Civil Commitment Adjudication*, 42 Ford L.Rev. 611, 616 (1974). See generally Albers, Pasewark and Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of Infallible Perception*, 6 Cap.L.Rev. 11 (1976).



must focus on the adequacy of state procedures and postdeprivation remedies.

Application of the criteria of *Mathews v. Eldridge*, *supra*, requires that the Court consider:

1. Burch's liberty interest in having or not having a hearing for involuntary placement.
2. The State's interest in its established procedures and its interest under its *parens patriae* powers in providing care to the mentally ill.
3. How well the established procedures protect against the risk of error in the decision as to whether a patient should be placed voluntarily or involuntarily.

*Parham*, *supra*, at 599-600; *Addington*, *supra*, at 426.

With respect to the first, it is difficult to conclude that the interest of a seriously ill person in having an adversary hearing to declare his incapacity to consent to hospital admission significantly outweighs, if it outweighs at all, his interest in prompt treatment.<sup>13</sup> First, such a hearing inevitably means delay in treatment.<sup>14</sup> Second, a declaration of "incompetency" — for that is what it amounts to — may well have an adverse and stigmatizing effect on the individual. *Parham*, *supra*, at 600; *Addington*, *supra*, at 425-426. It is

<sup>13</sup> Assuming, of course, that no non-emergency surgical procedures or nonstandard therapies are contemplated. The consent form Burch signed did not authorize surgical procedures or electroconvulsive treatment. (R 21; Ex. E-5)

<sup>14</sup> The adversary trial in the *Addington* case, for example, lasted six days. 441 U.S. at 420.

certainly no exaggeration to say that some people may well refrain from seeking treatment if, when there is doubt, they must face a trial and placement as involuntary patients. Of such consequences this Court has said, "[a] person needing, but not receiving, appropriate medical care may well face even greater social ostracism resulting from the observable symptoms of an untreated disorder." *Parham*, *supra*, at 601. The *parens patriae* interest cannot be fulfilled if the admission process "is too onerous, too embarrassing, or too contentious." *Id.* at 605.

Consistent with this admonition, Florida law permits a voluntary patient, his guardian or representative, to request discharge at any time, and the hospital must then discharge the patient or begin involuntary placement proceedings. Contrary to the pejorative terminology of the Court of Appeals, Burch, as a voluntary patient, was not "committed to a mental institution." See 840 F.2d at 803 (Pet. App. 26).

The State's interests in voluntary placement do not differ significantly from the patient's. The State has an obvious interest in providing prompt care and treatment of the ill. It has a compelling interest in not having diverted to the legal system the limited resources that would otherwise be available for care and treatment. And this interest extends to:

[A]llocating priority to the *diagnosis and treatment of patients as soon as they are admitted to a hospital rather than to time-consuming procedural minuetts before the admission.*

*Parham*, *supra*, at 605 (emphasis added). As a corollary to this, the State "has a significant interest in not imposing unnecessary procedural obstacles that may discourage the

mentally ill or their families from seeking needed psychiatric assistance." *Id.*

The third factor to consider is the risk of error in voluntary placements. Because the risk is largely unknowable, the voluntary patient has ample procedural protections under Florida law. Florida's laws rightly encourage voluntary placement but also provide for a hearing for those unable to give informed consent. Given that mental impairment of some degree is what impels people to seek state care, the question of who is able to give informed consent will nearly always be fraught with uncertainty. Florida protects those voluntarily placed by granting them or their guardian or representative the right to request discharge at anytime. A patient and his guardian or representative must be given written notice of his right to a discharge at the time of admission and each six months thereafter. §394.465(3), Florida Statutes (1981) (App. 27). Within three days of such a request, the patient must be released unless involuntary placement proceedings are begun. §394.465(2), Florida Statutes (1981) (App. 26). If a voluntary patient refuses treatment he must be discharged, or, if the treatment is essential to appropriate care, proceedings begun for appointment of a guardian advocate to act on the patient's behalf. §394.459(3)(a), Florida Statutes (1981) (App. 11). If Florida's procedures are followed, the risk of error that a person will be wrongfully detained is small.

The possibility remains, however, that those entrusted with the care of a voluntary patient may fail to recognize or may ignore possible incompetency. That seems to be the gist of the complaint in the instant case. But the remedy for that is not and should not be an action under §1983. First, false imprisonment is a tort, not a constitutional offense. "[F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state offi-

cial." *Daniels v. Williams*, 474 U.S. at 333, quoting *Baker v. McCollan*, 443 U.S. 137, 146 (1979). As a tort, false imprisonment is actionable under Florida law. §768.28, Florida Statutes (1981) (App. 38). Second, holding the threat of unlimited §1983 liability over the heads of individual professionals for not having held a hearing *in the first instance* is clearly unnecessary and counterproductive. Such a result would serve only to encourage the massive diversion of time, energy and resources to the judicial system in order to hold involuntary placement proceedings to guard against the §1983 lawsuit. The Court has clearly condemned such untoward results. *Parham, supra*, at 605-606, and n. 14.

The balance of patient and state interests dictates no need for additional procedures or extraordinary remedies in this case. Florida law is adequate to provide the process due a mental patient whose rights are not respected.

#### **B. Postdeprivation Remedies Under Florida Law Are Adequate to Provide Burch Due Process.**

Florida's mental health laws are comprehensive. A mentally ill person has the right to treatment. §394.459(2), Florida Statutes (1981) (App. 11). The law encourages voluntary admissions but clearly requires a judicial hearing for involuntary placement if the patient cannot give informed consent. §394.467(3), Florida Statutes (1981) (App. 30). With the required appointment of a guardian or representatives for even the voluntarily placed patients, Florida has gone to extraordinary lengths to protect procedural rights.

Remedies for the violation of a patient's rights are no less comprehensive. Florida has waived its sovereign immunity in tort. This waiver, effective at the time Burch was in the



care of FSH, granted anyone injured by the tortious acts of state employees the right to recover up to \$100,000 in an action directly against the State or the state agency which employed the wrongdoer. §§768.28(5) and 768.30, Florida Statutes (1981) (App. 39, 42). Moreover, under this law, a judgment or verdict may be rendered in excess of the limitation of \$100,000 and the Florida Legislature may, in its discretion, pay the amount that exceeds the limitation. §768.28(5), Florida Statutes (1981) (App. 39).

False imprisonment is a tort under Florida law. Detaining a patient involuntarily without compliance with the provisions of the Florida Mental Health Act constitutes false imprisonment and "[a]ll that is required are allegations that a person has been unlawfully restrained without color of authority." *Everett v. Florida Institute of Technology*, 503 So.2d 1382 (Fla. 5th DCA 1987), *appeal dismissed*, 511 So.2d 998 (Fla. 1987).

In addition, §394.459(13), Florida Statutes (1981) (App. 18), provides a statutory cause of action for damages against any person who violates the rights or privileges of patients under the Mental Health Act. Although persons acting in good faith are not to be held liable, good faith does not preclude liability for negligence. *Id.* The good faith defense does not mean that Florida's statutory cause of action is less comprehensive than §1983. In a §1983 action challenging treatment afforded involuntarily confined mental patients, this Court held that a professional's decision is presumptively valid, and:

[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person re-

sponsible actually did not base the decision on such a judgment.

*Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). Furthermore, good faith immunity bars §1983 liability where the failure to adhere to professional standards is attributable to budgetary constraints. *Id.*

We point out that §768.28(9)(a), Florida Statutes (1981) (App. 40), provides that neither the State nor its agencies shall be held liable for the acts or omissions of an agent or employee acting outside the scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton or willful disregard of human rights. This exception does not deprive an injured party of a right to recover damages. In such instances the employee alone is liable, and the injured party must sue the employee, not the State. *Bryant v. School Board of Duval County*, 399 So.2d 417, 423 (Fla. 1st DCA 1981), *affirmed in part, reversed in part*, 417 So.2d 658 (Fla. 1982).

The fact that a plaintiff must then look to the assets of the individual does not mean that available state remedies compare unfavorably with §1983. Damages can be recovered under §1983 only in an action against a state employee in his personal and individual capacity. *Kentucky v. Graham*, 473 U.S. 159 (1985) (Eleventh Amendment immunity of the States). Florida will not pay a judgment under §1983 on behalf of the employee when the employee intentionally caused the harm. See §284.38, Florida Statutes (1981) (App. 43). Section 284.38 remains in effect. Thus, when the harm is intentionally caused, the plaintiff, even in a §1983 action, must look to the personal assets of the state employee for recovery.



Although the Court has recognized that state remedies do not have to provide the exact equivalent of a §1983 action to afford complete due process, see *Parratt v. Taylor*, 451 U.S. 527, 544 (1981), it is submitted that the remedies available under §§394.459(13) and 768.28, Florida Statutes (1981), are more than adequate to afford Burch all the process due for the alleged deprivation of his rights. The Court should so find and rule that he has no claim for relief under §1983.

## II. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *PARRATT V. TAYLOR* AND RELATED CASES.

### A. The Court of Appeals Misapplied This Court's Decisions in *Parratt* and *Hudson*.

For the reasons we have stated, Florida's postdeprivation remedies afford respondent sufficient due process, particularly given the unique demands of the provision of mental health services. We believe, moreover, that this Court's decisions in *Parratt* and *Hudson* require the same conclusion.

1.a. In *Parratt*, the Court addressed the negligent actions of a state official that resulted in the loss of property. 451 U.S. at 530. After canvassing prior cases holding that postdeprivation process may be adequate when a predeprivation hearing is not feasible (*id.* at 538-541), the Court noted that an injury caused by negligence "is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. \* \* \* Indeed, in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation." *Id.* at 541. The Court therefore held that a postdeprivation remedy in the form of a tort action for recovery of the lost property satisfied the due process re-

quirement of a hearing " 'at a meaningful time and in a meaningful manner.' " *Id.* at 545 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); see *Parratt*, 451 U.S. at 543-44.

In *Hudson*, this Court considered *Parratt*'s implications in a case, like this one, that involved allegedly willful, but unauthorized, conduct by a state actor. There, a prison guard was alleged to have intentionally destroyed an inmate's property. The Court could find "no logical distinction" between the negligent conduct at issue in *Parratt* and "intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned," observing that "[t]he State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." 468 U.S. at 533. Indeed, the Court explained, "intentional acts are even more difficult to anticipate" since "one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent." *Id.* at 533 (emphasis added). The Court therefore held — unanimously on this point (see *id.* at 541 n. 4 (Stevens, J., concurring in part and dissenting in part)) — that " 'the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process.' " *Id.* at 14 (quoting *Parratt*, 451 U.S. at 539).<sup>15</sup>

<sup>15</sup> As Justice Stevens summarized the law, under *Hudson* and *Parratt*, "when a predeprivation hearing is clearly not feasible, when the regime of state tort law provides a constitutionally unobjectionable system of recovery for the deprivation of property or liberty, and when there is no other challenge to the State's procedures, a valid §1983 claim is not stated." *Daniels*, 474 U.S. at 339 (Stevens, J., concurring in the judgment)(footnote omitted).

In reaching this conclusion, the Court has recognized that it is the State's, rather than the individual state actor's, obligation to provide a system that makes adequate process available. Thus, when injury is caused by the misconduct of an individual state officer, "even though there is action 'under color of' state law sufficient to bring the [Fourteenth] amendment into play, the state action is not necessarily complete." *Parratt*, 451 U.S. at 542 (quoting *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (1975), *modified en banc*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978)). The adequacy of the state process cannot be determined "until and unless [the state] provides or refuses to provide a suitable postdeprivation remedy." *Hudson*, 468 U.S. at 533 (footnote omitted). In effect, the possibility that an individual state official will negligently or, as alleged here, "willful[ly], wanton[ly] and reckless[ly]" (Pet. App. 202) depart from established state procedure is an unavoidable defect in any state process and one that the state cannot be expected to eliminate altogether. A State therefore provides due process so long as it offers a mechanism, in the form of a state court action, that can correct the mistakes caused by such defects.

b. This case is controlled by *Parratt* and *Hudson*. Respondent's claim is grounded entirely on his allegation that particular state actors "knew or should have known that [he] was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH." Pet. App. 201; *see also id.* at 195, 197-198. In such cases, the Florida Mental Health Act makes clear that a hearing must be held before the patient is admitted for further treatment. *See* §394.467, Florida Statutes (1981)(App. 28). Thus, as in *Hudson*, respondent does not allege that the deprivation occurred "pursuant to an established state procedure" (468 U.S. at 534), or that "the procedures themselves are inadequate." *Parratt*, 451 U.S. at 543.

*See* Pet. App. 13 n. 8. In these circumstances, respondent can make out a denial of due process only if Florida's postdeprivation remedies are inadequate.

There is every indication, however, that Florida would provide respondent with a full recovery. As the dissenting judges pointed out (Pet. App. 74-76), there are at least three avenues available to Burch. First, Florida has waived its sovereign immunity "for itself and for its agencies or subdivisions" for injuries or property losses caused by a "negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment." §768.28(1) Florida Statutes (1981)(App. 38). Second, the Florida Mental Health Act itself provides that "[a]ny person who violates or abuses any rights or privileges of patients provided by this act is liable for damages." Although immunity is granted for actions taken in good faith, the Act "does not relieve any person from liability if such person is guilty of negligence." §394.459(13) Florida Statutes (1981). Finally, respondent may well have a common law action for false imprisonment. In Florida, the essence of the tort of false imprisonment is an "'unlawful . . . deprivation of liberty.'" *Harris v. Lewis State Bank*, 436 So.2d 338, 341 (Fla. 1st DCA 1983)(quoting *Johnson v. Weiner*, 155 Fla. 169, 171, 19 So.2d 699, 700 (1944)). And a Florida Court of Appeal has recently held that charges "stemming from \* \* \* involuntary confinement as a mental patient \* \* \* without compliance with [the Florida Mental Health Act] \* \* \* adequately allege the tort of false imprisonment." *Everett v. Florida Institute of Technology*, 503 So.2d 1382, 1383 (Fla. 5th DCA 1987), *appeal dismissed*, 511 So.2d 998 (Fla. 1987).

2. A plurality of the Court of Appeals distinguished the *Parratt* case, however, and therefore never considered the adequacy of Florida's postdeprivation process. The plurality



reasoned that the defendants in *Parratt* "lacked state-clothed authority to deprive the plaintiffs of their protected property interests" (Pet. App. 17)(emphasis in the original)). By contrast, in the plurality's view, petitioners in the present case "possessed state-clothed authority to deprive [respondent] of his liberty" (*id.* at 19). The plurality accordingly concluded that "[a] predeprivation hearing was practicable because the [petitioners] had both the ability to predict that one was required and the duty because of their state-clothed authority to provide one" (*ibid.* (emphasis in the original; footnote omitted)).

*Parratt* does not yield to the plurality's distinction. While it is surely true that petitioners possessed the authority to hospitalize respondent, they had no authority under Florida law to do so without affording respondent a timely hearing. Thus, like the prison officials in *Parratt* — who possessed the authority to receive the prisoner's hobby kit, but not the authority to misplace it — petitioners acted *outside* the authority conferred on them by state law. Respondent's loss of liberty, like the prisoner's property loss in *Parratt* (and in *Hudson*), was therefore the "result of a random and unauthorized act by \* \* \* state employee(s)" and "not a result of some established state procedure" (451 U.S. at 541). It follows as well that the State of Florida, like the State of Nebraska in *Parratt*, could not have "predict[ed] precisely when the loss [would] occur" and could not have "provide[d] a meaningful hearing before the deprivation [took] place" (*ibid.*).

**B. This Court Decided in *Ingraham V. Wright* That Postdeprivation Remedies Can Provide Adequate Due Process For the Deprivation Of A Liberty Interest.**

Although the Court of Appeals did not specifically so state, its analysis clearly reflects an unwillingness to apply the rationale of *Parratt* and *Hudson* to the deprivation of a liberty interest. The court's reluctance is unwarranted for "due process is flexible and calls for such procedural protection as the particular situation demands." *Morissey v. Brewer*, 408 U.S. 471, 481 (1972). Neither history nor logic compels a rigid distinction between property and liberty interests. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 ("the dichotomy between personal liberties and property rights is a false one").

This Court has pointedly stated that its Due Process analysis in *Parratt* and *Hudson* was consistent with the approach taken by the Court in *Ingraham v. Wright*, 430 U.S. 651 (1977). See *Parratt*, at 451 U.S. 542-543, and *Hudson*, at 468 U.S. 533 and n. 14. *Ingraham* presented a claim for damages and injunctive relief under 42 U.S.C. §§1981-1988 on behalf of children subjected to corporal punishment in public schools without the benefit of a prior hearing. Although Fourteenth Amendment interests were implicated, 430 U.S. at 674, the question of what process was due the children — given historical circumstances, the minimal risk of abuse or error and the need for quick and effective disciplinary measures in the school system — required consideration of available state remedies. Finding those adequate to provide all the process due, the Court denied relief.

We do not rely on *Ingraham* in order to contend that Burch was not entitled to a hearing if he was unable to give his



informed consent. Rather, if *Ingraham* is consistent with *Hudson* and *Parratt*, as the Court stated, then the analysis employed in those cases applies as well to the deprivation of a liberty interest, and the focus should be on the adequacy of state remedies.

In attempting to distinguish *Parratt*, the Court of Appeals said petitioners were clothed with state authority to deprive Burch of his liberty in determining "whether Burch had given his voluntary, knowing and express consent. . . ." (Pet. App. 16,17) 840 F.2d at 801. In contrast, the court said the prison officials in *Parratt* lacked state-clothed authority to deprive inmates of their property interests. *Id.*

This distinction is wrong because the petitioners here were authorized only to make medical judgments, as best they could, in situations where uncertainty is generally beyond reach. See *Addington v. Texas*, 441 U.S. 418, 430 (1979). They had no authority to "willfully" deprive Burch of his liberty anymore than the prison officials in *Hudson*, who were authorized to search cells, could intentionally destroy an inmate's noncontraband property. Their "state-clothed" authority is no different from that of the classroom teacher in *Ingraham* who had state-clothed authority to paddle, not to injure, the unruly student. Petitioners here had authority to initiate judicial proceedings, depending on their judgment, but not otherwise to detain Burch against his will. They may not have followed appropriate procedures, but neither did the official who handled prisoner mail in *Parratt* or the official who searched the cell in *Hudson*.

As shown, Florida was not in a position to prevent the random and unauthorized disregard of state law by its agents. Therefore, examination of state remedies is necessary and the Court of Appeals erred in not undertaking that inquiry.

### C. This Court's Decision in *Logan* Does Not Govern The Present Case.

Judge Clark, in his concurring opinion (Pet. App. 32-47), and Judges Anderson and Godbold, in their opinion concurring specially (*Id.* at 47-56), concluded that this case is governed by *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), and not by *Parratt* and *Hudson*. We disagree.

In *Logan*, appellant filed a complaint with the Illinois Fair Employment Practices Commission, alleging employment discrimination on the basis of his handicap. "Apparently through inadvertence" (455 U.S. at 426), however, appellant's claim was not heard within the statutory period, and accordingly the complaint was dismissed. The Illinois Supreme Court thereafter held that the passing of the statutory period barred appellant's claim; it also rejected appellant's assertion that such a bar violated his due process and equal protection rights under the Fourteenth Amendment. This Court reversed, holding that the State, having conferred the right to complain of unfair employment practices, deprived the appellant of property without due process when it terminated his claim without a hearing. Moreover, the Court rejected the contention that, under *Parratt*, appellant "should be remitted to [state] tort remedies" (455 U.S. at 435). The Court explained that "[i]n *Parratt*, the Court . . . was dealing with a 'tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure' (*id.* at 435-436 (citation omitted)). '[I]n contrast,' the

Court stated, in the case before it "it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference — whether the Commission's action is taken through negligence, maliciousness, or otherwise" (*id.* at 436). "Unlike the complainant in *Parratt*," the appellant in *Logan* was "challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards" (*ibid.*). The Court concluded that *Parratt* was not designed to reach such a situation" (*ibid.*).

Thus, the *Logan* exception to the rule in *Parratt* applies only when the deprivation of liberty or property results from systematic action that is fairly attributable to the State. See, e.g., *Easter House v. Felder*, 852 F.2d 901, 914 (7th Cir. 1988) (*Logan* applies to "steps taken under a regular routine that systematically deprive[s] claimants of property without a predeprivation hearing"). A successful claimant under *Logan* must therefore allege that his injury "is the product of the operation of state law, regulation, or institutionalized practice" (*Haygood v. Younger*, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986), and not simply the action of "an individual [state] officer against whom the plaintiff could have sought relief under state law" (*Flower Cab Co. v. Petite*, 685 F.2d 192, 195 (7th Cir. 1982)). See, e.g., *Brower v. County of Inyo*, 817 F.2d 540, 545 (9th Cir. 1987), rev'd on other grounds, 109 S.Ct. 1378 (1989) (upholding claim under *Logan* where plaintiffs alleged deprivations "pursuant to a policy and procedure" of a county and its sheriff's department); *Sanders v. Kennedy*, 794 F.2d 478, 480, 482 (9th Cir. 1986) (upholding claim under *Logan* where plaintiffs alleged that certain unlawful police practices were performed "pursuant to official policies, practices, and customs of the City of Anaheim, its Chief of Police, and its City Council").

*Logan* does not control this case. Respondent's confinement without a timely hearing resulted not from an "established state procedure" (*Logan*, 455 U.S. at 436), but rather from the alleged flouting of established state procedure. Here, unlike *Logan*, the state was fully prepared to provide a predeprivation hearing; it had mandated that such a hearing be provided; and it had even devised sanctions for the willful failure to comply with that mandate. In short, respondent alleged not a failure of state procedure, but only a failure by state employees to abide by the requirements of state law. Such a claim is foreclosed by *Parratt*, and is not controlled by *Logan*.

In their separate concurring opinions, Judges Clark and Anderson reached a different conclusion, but both judges misconstrued the *Logan* decision. Judge Clark concluded that *Logan* applies in this case because, in his view, petitioners "were required by state law to secure a due process hearing and were not authorized to detain [respondent] without securing the hearing." (Pet. App. 39-40) Accordingly, he reasoned, "[a]s in *Logan*, the failure of the Florida officials to arrange for a hearing was a deprivation of an 'established state procedure'" (*id.* at 40). But the *Logan* case does not apply to deprivations of established state procedure; it applies to deprivations resulting from such procedures. Respondent does not and could not contend that Florida procedures themselves deprived him of his rights, only that he was denied the benefit of those procedures by the unauthorized conduct of certain state employees. *Logan* does not extend to such conduct.

Judge Anderson also found *Logan* applicable because respondent had alleged that the deprivation of his liberty was effected "under the color and pretense of the \* \* \* customs or usages of the State of Florida." (Pet. App. 49) But the complaint in this case falls far short of alleging the kind of



"institutional practice" (*Haygood v. Younger, supra*, 769 F.2d at 1357) that might constitute an established state procedure under the *Logan* rationale. Indeed, neither the majority in the court below, nor the respondent in his pleadings, makes any such claim.

Judge Anderson seemed to infer from Exhibit G to the complaint that FSH had an established procedure of asking patients to sign voluntary consent forms when they were not competent to do so. There is, however, no such allegation in the complaint. Exhibit G was referenced and incorporated in support of the following allegation in Count III:

27. Defendants, and each of them, knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH. See Exhibit G attached hereto and incorporated herein.<sup>16</sup>

The dissent below correctly points out Exhibit G was not incorporated into the complaint to show an established state procedure and it does not reflect such. 840 F.2d at 797 n. 2 (Pet. App. 62). The letter reports that the hospital's Human

<sup>16</sup> Exhibit G, which is a letter from a state agency to Burch, reports that the hospital's Human Rights Advocacy Committee had discussed the circumstances of his admission with the administration of FSH, and "hospital administration was made aware that they were very likely asking medicated patients to make a decision when they were not mentally competent."

Rights Advocacy Committee investigated Burch's complaint.<sup>17</sup> At most the letter could be construed as stating that some patients at one hospital had been improperly asked to give their voluntary consent to admission. The letter does not state that such error was a common practice at FSH or that such incidents reflected state policy in effect at FSH and other institutions. Indeed, the letter is limited to one hospital where only Burch's records were considered. If anything, the letter reflects the State's efforts to adhere to proper procedures.

Having this letter in hand when drafting the complaint, Respondent Burch was not moved to plead any facts or even a conclusory allegation to the effect that his liberty deprivation resulted from an "established state procedure." The Court of Appeals found no reason to rewrite his complaint, and neither should this Court.

<sup>17</sup> The Committee is a component of the Florida Department of Health and Rehabilitative Services. §20.19(7), Florida Statutes (1983) (App. 43, 45) Its duties include protecting the constitutional and human rights of any client in a facility operated by the Department, and it may investigate and resolve reports of violations of constitutional and human rights. §20.19(7)(a) and (g) (App. 45). It may appeal to the Statewide Human Rights Advocacy Committee any unresolved complaints. (App. 46)



## CONCLUSION

The judgment of the Court of Appeals reversing the dismissal of the complaint against petitioners should be reversed. The case should be remanded with instructions to reinstate the judgment for petitioners that was rendered by the district court.

Respectfully submitted,

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May 5, 1989

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief for Petitioners was served in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in an United States Post Office or mailbox, with first-class postage prepaid, addressed to:

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/s/  
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NO. 87-1965

IN THE  
**Supreme Court of the United States**  
October Term, 1988

**MARLUS C. ZINERMON, M.D., et al.,**

*Petitioners,*

v.

**DARRELL BURCH,**

*Respondent.*

**PETITIONERS' APPENDIX**

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## TABLE OF CONTENTS

	<i>Page</i>
<b>Ch. 394, Florida Statutes (1981)</b>	
§394.451 . . . . .	A-1
§394.453 . . . . .	A-1
§394.455 . . . . .	A-2
§394.457 . . . . .	A-6
§394.4573 . . . . .	A-9
§394.459 . . . . .	A-10
§394.460 . . . . .	A-19
§394.461 . . . . .	A-19
§394.463 . . . . .	A-20
§394.465 . . . . .	A-25
§394.467 . . . . .	A-28
§394.468 . . . . .	A-34
§394.469 . . . . .	A-35
§394.471 . . . . .	A-36
§394.473 . . . . .	A-36
§394.475 . . . . .	A-37
§394.477 . . . . .	A-38
§768.28, Fla. Stat. (1981) . . . . .	A-38
§768.30, Fla. Stat. (1981) . . . . .	A-42
§284.38, Fla. Stat. (1981) . . . . .	A-43
§20.19, Fla. Stat. (1983) . . . . .	A-43



## CHAPTER 394, Florida Statutes (1981)

### MENTAL HEALTH, Part I

**394.451 Short title.**—This part shall be known as "The Florida Mental Act" or "The Baker Act."

**394.453 Legislative intent.**—It is the intent of the Legislature to authorize and direct the Department of Health and Rehabilitative Services to evaluate, research, plan, and recommend to the Governor and the Legislature programs designed to reduce the occurrence, severity, duration, and disabling aspects of mental, emotional, and behavioral disorders. The department is directed to implement and administer mental health programs as authorized and approved by the Legislature, based on the department's annual program budget. It is the further intent of the Legislature that programs of the department shall coordinate the development, maintenance, and improvement of receiving and community treatment facilities within the programs of the district mental health boards as authorized by the Community Mental Health Act, part IV of this chapter. Treatment programs shall include, but not be limited to, comprehensive health, social, educational, and rehabilitative services to persons requiring intensive short-term and continued treatment in order to encourage them to assume responsibility for their treatment and recovery. It is intended that patients shall be provided with emergency service and temporary detention for evaluation when required; that patients be admitted to treatment facilities on a voluntary basis when extended or continuing care is needed and unavailable in the community; that involuntary placement be provided only when expert evaluation determines that it is necessary; and that individual dignity and human rights be guaranteed to all persons admitted to

mental health facilities. It is further the intent of the Legislature that the least restrictive means of intervention be employed based on the individual needs of each patient within the scope of available services. Nothing in this act shall be construed to affect any policies relating to admission to hospital staff.

**394.455 Definitions.**—As used in this part, unless the context clearly requires otherwise:

(1) "Hospital" means a public or private hospital or institution or part thereof licensed by the Department of Health and Rehabilitative Services and equipped to provide inpatient care and treatment facilities, or any hospital under the supervision of the department.

(2) "Mental health professional" means an individual licensed or authorized to practice medicine or osteopathy under the laws of this state who has primarily diagnosed and treated mental and nervous disorders for a period of not less than 3 years, inclusive of psychiatric residency; a clinical psychologist who has not less than 1 year of clinical experience in the diagnosis and treatment of mental and nervous disorders; or, in instances in which individuals having such qualifications are not present at the time and place where mental health services are needed or, if present, do not voluntarily participate in the delivery of mental health services, a physician licensed pursuant to chapter 458 or chapter 459 who has diagnosed and treated mental and nervous disorders. For the purposes of initiating emergency admissions under §394.463(1)(b)3., initiating court-ordered evaluation pursuant to §394.463(2)(b)2., and

certifying and testifying that a patient manifests criteria for involuntary placement pursuant to the provisions of <sup>1</sup>§1394.467(2)(b)2. and (3)(a), "mental health professional" also means a registered nurse with a masters or doctoral degree in psychiatric nursing and 2 years of postmasters clinical experience under the supervision of a physician possessing the above-stated experience in diagnosis of mental and nervous disorders. For the purpose of providing services described in this act to patients at facilities operated by the United States Veterans Administration which facilities meet the requirements of receiving and treatment facilities, a physician or psychologist employed by the United States Veterans Administration shall be considered a "mental health professional."

(3) "Mentally ill" means having a mental, emotional, or behavioral disorder which substantially impairs the person's mental health.

(4) "Department" means the Department of Health and Rehabilitative Services.

(5) "Secretary" means the secretary of the Department of Health and Rehabilitative Services.

(6) "Mental health board" means the board within a board district established in accordance with the provisions of the Community Mental Health Act, part IV of this chapter, for the purposes of administering the community mental health program.

(7) "Board district" means that area over which a single mental health board has jurisdiction for administering men-

<sup>1</sup> Note.—This cross-reference is erroneous.



tal health programs as provided by the Community Mental Health Act, part IV of this chapter, and may consist of one or more services districts.

(8) "Facility" means any state-owned or state-operated hospital or state-aided community facility designated by the department to be utilized for the evaluation, diagnosis, care, treatment, training, or hospitalization of persons who are mentally ill, and any other hospital within the state approved and designated for such purpose by the department.

(9) "Community facility" means a facility which receives funds from the state under the Community Mental Health Act, part IV of this chapter.

(10) "Receiving facility" means a facility designated by the department to receive patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment, and also means a private facility when rendering services to a private patient pursuant to the provisions of this act.

(11) "Treatment facility" means a state-owned, state-operated, or state-supported hospital, center, or clinic designated by the department for the treatment and hospitalization of persons who are mentally ill, including facilities of the United States Government, and also means a private facility when rendering services to a private patient pursuant to the provisions of this act. Patients treated in facilities of the United States Government shall be solely those whose care is the responsibility of the Veterans Administration.

(12) "Private facility" means any hospital or facility operated by a nonprofit corporation or association or a proprietary hospital approved by the department.

(13) "Patient" means any mentally ill person who seeks hospitalization under this part, or any person for whom such hospitalization is sought.

(14) "Administrator" means the chief administrative officer of a receiving or treatment facility or his designee.

(15) "Staff member" means any employee of a receiving or treatment facility who has been designated as a staff member by the department.

(16) "Law enforcement officer" means any city police officer, officer of the state highway patrol, sheriff, or deputy sheriff.

(17) "Guardian" means a natural guardian of a minor or legal guardian appointed by a court to maintain custody and control of the person or of the property of an incompetent.

(18) "Representative" means a person appointed to receive notice of proceedings for and during hospitalization and to take actions for and on behalf of the patient.

(19) "Court" unless otherwise specified, means the circuit court.

(20) "Judge," unless otherwise specified, means the judge of the circuit court or the judge designated to act under this act by the chief judge of a circuit.

(21) "Clinical record" means all parts of the record required to be maintained and includes all medical records, progress notes, charts, admission and discharge data, and all other information recorded by a facility which pertains to the patient's hospitalization and treatment.

(22) "Express and informed consent" means consent voluntarily given in writing after sufficient explanation and disclosure of the subject matter involved to enable the person whose consent is sought to make a knowing and



willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion.

### **394.457 Operation and administration.—**

(1) **ADMINISTRATION.**—The Department of Health and Rehabilitative Services is designated the "Mental Health Authority" of Florida. The department shall exercise executive and administrative supervision over all mental health facilities, programs, and services.

(2) **RESPONSIBILITIES OF THE DEPARTMENT.**—The department is responsible for the planning, evaluation, and coordination of a complete and comprehensive statewide program of mental health including community services, receiving and treatment facilities, child services, research, and training. The department is also responsible for the implementation of programs and coordination of efforts with other departments and divisions of the state government, county and municipal governments, and private agencies concerned with and providing mental health services. It is responsible for establishing standards, providing technical assistance, and exercising supervision of mental health programs of state-supported community facilities and other facilities for the mentally ill. It shall stimulate research by public and private agencies, institutions of higher learning, and hospitals in the interest of elimination and amelioration of mental illness. The department may contract for residential and nonresidential services to be provided by receiving and treatment facilities and shall promulgate rules to implement any such services.

(3) **POWER TO CONTRACT.**—The department may contract to provide, and be provided with, services and facilities in order to carry out its responsibilities under this part with the following agencies: district mental health boards; public and private hospitals; clinics; laboratories; departments,

divisions and other units of state government; the state colleges and universities; the community colleges; private colleges and universities; counties, municipalities, and any other governmental unit, including facilities of the United States Government; and any other public or private entity which provides or needs facilities or services. Services contracted for by the department may be reimbursed by the state at a rate up to 100 percent. The department shall make periodic audits and inspections to assure that the contracted services are provided and meet the standards of the department.

(4) **APPLICATION FOR AND ACCEPTANCE OF GIFTS AND GRANTS.**—The department may apply for, and accept any funds, grants, gifts, or services made available to it by any agency or department of the Federal Government or any other public or private agency or individual in aid of mental health programs. All such moneys shall be deposited in the State Treasury and shall be disbursed as provided by law.

### **(5) RULES AND REGULATIONS; PERSONNEL.—**

(a) The department shall adopt rules and regulations necessary for administration of this part in accordance with the Administrative Procedure Act, chapter 120.

(b) The department shall, by regulation, establish standards of education and experience for professional and technical personnel employed in mental health programs.

### **(6) HEARING OFFICERS.—**

(a) One or more hearing officers shall be assigned by the Division of Administrative Hearings to conduct hearings for continued involuntary placement.

(b) Hearings on requests for orders authorizing continued involuntary placement filed in accordance with §394.467(4) shall be conducted in accordance with the provisions of

§120.57(1), except that any order entered by the hearing officer shall be final and subject to judicial review in accordance with §120.68, except that orders concerning patients committed after successfully pleading not guilty by reason of insanity shall be governed by the provisions of §394.467(5).

(7) **PAYMENT FOR CARE OF PATIENTS.**—Fees and fee collections for patients in treatment facilities shall be according to §402.33.

(8) **DESIGNATION OF TREATMENT FACILITIES.**—Florida State Hospital located at Chattahoochee, Gadsden County; G. Pierce Wood Memorial Hospital located at Arcadia, DeSoto County; South Florida State Hospital located at Hollywood, Broward County; and Northeast Florida State Hospital located at Macclenny, Baker County; and such other facilities as may be established by law or designated by the department in order to ensure availability of the least restrictive environment, including facilities of the United States Government, if such designation is agreed to by the appropriate governing body or authority, are designated as treatment facilities.

(9) **DESIGNATION OF APPROVED PRIVATE PSYCHIATRIC FACILITIES.**—Private psychiatric facilities may be approved by the department to provide emergency admission, court-ordered evaluation, and treatment on an involuntary basis. Such facilities are authorized to act in the same capacity as receiving and treatment facilities and are subject to all the provisions of this part, except that patients shall have the right to a hearing for continued involuntary placement every 90 days according to established hearing procedures set forth herein.

**394.4573 Mental health services plan; case management system; measures of performance; reports.—**

(1) The Department of Health and Rehabilitative Services is directed to develop a plan for the provision of continuity of mental health care, through the provisions of case management, including clients referred from state treatment facilities to community mental health facilities. Such plan shall include the creation of a case management system throughout the state designed to:

(a) Reduce the possibility of a client's admission or readmission to a state treatment facility.

(b) Provide for the creation or designation of an agency in each county to provide single intake services for each person seeking mental health services. Such agency shall provide information and referral services necessary to ensure that clients receive the most appropriate and least restrictive form of care, based on the individual needs of the person seeking treatment. Such agency shall have a single telephone number, manned 24 hours per day, 7 days per week, where practical, at a central location, where each client will have a central record.

(c) Advocate on behalf of the client to ensure that all appropriate services are afforded to the client in a timely and dignified manner.

(2) The department is directed to develop and include in contracts with the district mental health boards, measures of performance with regard to goals and objectives as specified in the state plan. Such measures shall use, to the extent practical, existing data collection methods and reports and shall not require, as a result of this subsection, additional reports on the part of service providers. The department is also directed to combine, where practical, reports and reporting requirements with the data requirements of district



mental health boards. The department shall plan monitoring visits of community mental health facilities with other state, federal, and local governmental and private agencies charged with monitoring such facilities.

(3) Beginning in 1982, the department is directed to submit a report to the Legislature, prior to April 1 of each year, outlining departmental progress towards the implementation of the minimum staffing patterns' standards in state mental health treatment facilities. The report shall contain, by treatment facility, information regarding goals and objectives and departmental performance toward meeting each such goal and objective.

#### **394.459 Rights of patients.—**

(1) **RIGHT TO INDIVIDUAL DIGNITY.**— The policy of the state is that the individual dignity of the patient shall be respected at all times and upon all occasions, including any occasion when the patient is taken into custody, detained, or transported. Procedures, facilities, vehicles, and restraining devices utilized for criminals or those accused of crime shall not be used in connection with the noncriminal mentally ill except for the protection of the patient or others. The noncriminal mentally ill shall not be detained or incarcerated in the jails of this state. In criminal cases, a jail may be used as an emergency facility no longer than 45 days. Treatment shall be provided to the patient by his mental health professional or the receiving facility staff. No person who is receiving treatment for mental illness in a facility shall be deprived of any constitutional rights. However, if such a person is adjudicated incompetent pursuant to the provisions of this part, his rights may be limited to the same extent the rights of any incompetent person are limited by general law.

#### **(2) RIGHT TO TREATMENT.—**

(a) The policy of the state is that the department shall not deny treatment for mental illness to any person, and that no services shall be delayed at a receiving or treatment facility because of inability to pay.

(b) It is further the policy of the state that the least restrictive available treatment be utilized based on the individual needs and best interests of the patient.

(c) Each person who is admitted to a receiving or treatment facility, and each person who remains at a facility for a period in excess of 12 hours, shall be given a physical examination by a health practitioner authorized by law to give such examinations within 24 hours after arrival at any such facility.

#### **(3) RIGHT TO EXPRESS AND INFORMED PATIENT CONSENT.—**

(a) All persons entering a facility shall be asked to give express and informed consent for treatment after disclosure to the patient if he is competent, or his guardian if he is a minor or is incompetent, of the purpose of the treatment to be provided, the common side effects thereof, alternative treatment modalities, the approximate length of care, and that any consent given by a patient may be revoked orally or in writing prior to or during the treatment period by the patient or his guardian. If a voluntary patient refuses to consent to or revokes consent for treatment, such patient shall be discharged within 3 days or, in the event the patient meets criteria for involuntary placement, such proceedings shall be instituted within 3 days. If any patient refuses treatment and is not discharged as a result, treatment may be rendered such patient in the least restrictive manner on an emergency basis, upon the written order of a mental health professional when such mental health professional



determines treatment is necessary for the safety of the patient or others. If any patient refuses to consent to treatment or revokes consent previously provided, and if, in the opinion of the patient's mental health professional, the treatment not consented to is essential to appropriate care for such patient hereunder, then the administrator shall immediately petition the hearing examiner for a hearing to determine the competency of the patient to consent to treatment. If the hearing examiner finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate, who shall act on the patient's behalf relating to provision of express and informed consent to treatment. A guardian advocate appointed pursuant to the provisions of this act shall meet the qualifications of a guardian contained in part IV of chapter 714, except that no mental health professional, department employee, or facility administrator shall be appointed.

(b) In addition to the provisions of paragraph (a), in the case of surgical procedures requiring the use of a general anesthetic or electroconvulsive treatment, and prior to performing the procedure, written permission shall be obtained from the patient, if he is legally competent, from the parent or guardian of a minor patient, or from the guardian of an incompetent patient. The facility administrator or his designated representative may, with the concurrence of the patient's attending physician, authorize emergency surgical treatment if such treatment is deemed lifesaving and permission of the patient and his guardian or representative cannot be obtained.

(c) When the department is the legal guardian or representative of a patient, or is the custodian of a patient whose physician is unwilling to perform surgery based solely on the patient's consent and whose parent or legal guardian is unknown or unlocatable, a court of competent jurisdiction shall hold a hearing to determine the appropriateness of the

surgical procedure. The patient shall be physically present, unless the patient's medical condition precludes such presence, represented by counsel, and provided the right and opportunity to be confronted with, and to cross-examine, all witnesses alleging the appropriateness of such procedure. In such proceedings, the burden of proof by clear and convincing evidence shall be on the party alleging the appropriateness of such procedure.

#### (4) QUALITY OF TREATMENT.—

(a) Each patient in a facility shall receive treatment suited to his needs, which shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. Each patient shall receive such medical, vocational, social, educational, and rehabilitative services as his condition requires to bring about an early return to his community. In order to achieve this goal, the department is directed to coordinate its mental health programs with all other programs of the department.

(b) If a patient is able to secure the services of a private mental health professional, he shall be allowed to see his mental health professional at any reasonable time. In addition, any patient's attending mental health professional may utilize the services of a consulting mental health professional for the purpose of aiding in evaluation, diagnosis, and treatment. Such consultant may be reimbursed in a manner to be determined by the department within available funds, for services related to this act. The department shall establish rules designed to facilitate examination and treatment by private mental health professionals on a consulting basis.

# **(5) COMMUNICATION, ABUSE REPORTING, AND VISITS.—**

(a) Each patient in a facility has the right to communicate freely and privately with persons outside the facility unless it is determined that such communication is likely to be harmful to the patient or others.

(b) Each patient shall be allowed to receive, send, and mail sealed, unopened correspondence, and no patient's incoming or outgoing correspondence shall be opened, delayed, held, or censored by the facility unless there is reason to believe that it contains items or substances which may be harmful to the patient or others, in which case the administrator may direct reasonable examination of such mail and may regulate the disposition of such items or substances.

(c) If a patient's right to communicate is restricted by the administrator, written notice of such restriction shall be served on the patient and his guardian or representatives, and such restriction shall be recorded on the patient's clinical record with the reasons therefor. The restriction of a patient's right to communicate shall be reviewed at least every 90 days.

(d) The department shall establish reasonable rules governing visitors, visiting hours, and the use of telephones by patients in the least restrictive possible manner.

(e) Each patient receiving mental health treatment shall have ready access to a telephone in order to report an alleged abuse. The facility staff shall verbally and in writing inform each patient of the procedure for reporting abuse. A written copy of said procedure, including the telephone number of the abuse registry and reporting forms, shall be posted in plain view.

(f) The department shall adopt rules providing a procedure for reporting abuse. Facility staff shall be required, as

a condition of employment, to become familiar with the procedures for reporting of abuse.

(6) CARE AND CUSTODY OF PERSONAL EFFECTS OF PATIENTS.—A patient's right to his clothing and personal effects shall be respected. The administrator may take temporary custody of such effects when required for medical and safety reasons. Custody of such personal effects shall be recorded in the patient's clinical record.

(7) VOTING IN PUBLIC ELECTIONS.—A patient in a facility who is eligible to vote according to the laws of the state has the right to vote in the primary and general elections. The department shall establish rules and regulations to enable patients to obtain voter registration forms, applications for absentee ballots, and absentee ballots.

(8) EDUCATION OF CHILDREN.—The department shall provide education and training appropriate to the needs of all children in treatment facilities. Efforts shall be made to provide this education and training in the least restrictive setting available.

(9) CLINICAL RECORD; CONFIDENTIALITY.—A clinical record for each patient shall be maintained. The record shall include data pertaining to admission and such other information as may be required under rules of the department. Unless waived by express and informed consent by the patient or his guardian or attorney, the privileged and confidential status of the clinical record shall not be lost by either authorized or unauthorized disclosure to any person, organization, or agency. The clinical record shall not be a public record, and no part of it shall be released, except:

(a) The record may be released to mental health professionals, attorneys, and government agencies as designated by the patient, his guardian, or his attorney. A medical discharge summary of the clinical record of any patient



committed to, or to be returned to, the Department of Corrections from the Department of Health and Rehabilitative Services shall be released to the Department of Corrections without charge upon its request. The Department of Corrections shall treat such information as confidential and shall not release such information except as provided in this section.

(b) The record shall be produced in response to a subpoena or released to persons authorized by order of court, excluding matters privileged by other provisions of law.

(c) The record or any part thereof may be disclosed to a qualified researcher, a staff member of the facility, or an employee of the department when the administrator of the facility or secretary of the department deems it necessary for treatment of the patient, maintenance of adequate records, compilation of treatment data, or evaluation of programs.

(d) Information from the clinical records may be used for statistical and research purposes if the information is abstracted in such a way as to protect the identity of individuals.

#### (10) HABEAS CORPUS.—

(a) At any time, and without notice, a person detained by a facility, or a relative, friend, guardian, representative, or attorney on behalf of such person, may petition for a writ of habeas corpus to question the cause and legality of such detention and request that the circuit court issue a writ for release. Each patient admitted to a facility for involuntary placement shall receive a written notice of the right to petition for a writ of habeas corpus.

(b) A patient or his guardian or representatives may file a petition in the circuit court in the county where the patient is hospitalized alleging that the patient is being unjustly

denied a right or privilege granted herein or that a procedure authorized herein is being abused. Upon the filing of such a petition, the circuit court shall have the authority to conduct a judicial inquiry and to issue any appropriate order to correct an abuse of the provisions of this part.

(11) TRANSPORTATION.—If neither the patient nor any person legally obligated or responsible for the patient is able to pay for the expense of transporting the patient to a treatment facility, the governing board of the county from which the patient is hospitalized shall arrange for such required transportation. The department shall promulgate rules and regulations to insure safe and dignified transportation for all patients.

#### (12) DESIGNATION OF REPRESENTATIVES; NOTICE OF ADMISSION.—

(a) At the time a patient is admitted to a facility, the names and addresses of two representatives or one guardian shall be entered in the patient's clinical record.

1. A treatment facility shall give written notice of the patient's admission to his guardian or representatives.

2. A receiving facility shall give notice of admission to the patient's guardian or representatives by telephone or in person within 24 hours.

(b) If the patient has no guardian, he may designate one representative; the second representative, or both in the absence of designation of one representative by the patient, shall be selected by the facility. The first representative selected by the facility shall be made from the following in the order of listing:

1. The patient's spouse;
2. An adult child;



3. Parent;
4. Adult next of kin;
5. Adult friend;
6. Appropriate human rights advocacy committee as defined in §20.19; or
7. The department.

The second representative selected by the facility shall be without regard to the order of listing, except that the department shall only be selected as the representative of last resort in cases where the patient is receiving service in a state-operated facility. If the facility can locate only one person from the categories listed above, it shall only be required to select one representative.

(c) The patient shall be consulted with regard to the appointment of a representative and have authority to request that an appointed representative be replaced.

(d) Unless otherwise provided, notice to the patient's guardian or representatives shall be served by registered or certified mail or receipted hand delivery, and the date on which such notice was mailed shall be entered on the patient's clinical record.

(13) **LIABILITY FOR VIOLATIONS.**—Any person who violates or abuses any rights or privileges of patients provided by this act shall be liable for damages as determined by law. Any person who acts in good faith in compliance with the provisions of this part shall be immune from civil or criminal liability for his actions in connection with the admission, diagnosis, treatment, or discharge of a patient to or from a facility. However, this section shall not relieve any person from liability if such person is guilty of negligence.

**394.460 Rights of mental health professionals.**—No mental health professional shall be required to accept patients for treatment of mental, emotional, or behavioral disorders. Such participation shall be voluntary.

**394.461 Facilities; transfers of patients.**—

(1) **RECEIVING FACILITY.**—The Department of Health and Rehabilitative Services may designate any community facility as a receiving facility for emergency, short-term treatment and evaluation. The governing board of any county is authorized to contract with the department or with the mental health board of a board district, with the approval of the department, to set aside an area of any facility of the department to function, and be designated, as the receiving facility. Any other facility within the state, including a federal facility, may be so designated by the department at the request of and with the consent of the governing officers of the facility.

(2) **TREATMENT FACILITY.**—Any state-owned, state-operated, or state-supported facility may be designated by the department as a treatment facility. Any other facility, including a federal facility, may be so designated by the department at the request of, or with the consent of, its governing officers.

(3) **TRANSFERS OF PATIENTS.**—

(a) Any patient who has been admitted to a treatment or receiving facility on a voluntary basis and is able to pay for treatment in a private facility may apply to the department for transfer at his expense to such private facility. A patient may apply to the department for transfer from a private facility to a public facility. An involuntary patient may be transferred at the discretion of the department or upon application by the patient or the guardian of said patient.

(b) When the medical needs of the patient or efficient utilization of the facilities of the department require, a patient may be transferred from one facility of the department to another, or, with the express and informed consent of the patient and his guardian or representatives, to a facility in another state.

(c) When any patient is to be transferred, notice shall be given to his guardian or representatives prior to the transfer.

(4) **CRIMINALLY CHARGED OR CONVICTED MENTALLY ILL PERSONS.**—The Florida State Hospital shall not be required to maintain separate treatment facilities for criminally charged or convicted mentally ill persons.

### **394.463 Admission for emergency or evaluation.—**

#### **(1) EMERGENCY ADMISSION.—**

(a) *Criteria.*—A person may be admitted to a receiving facility on emergency conditions if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injury himself or others if allowed to remain at liberty; or

2. in need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf, and an ex parte order is obtained authorizing the admission.

(b) *Initiation of proceeding.* An emergency admission may be initiated as follows:

1. A judge may enter an ex parte order stating that a person appears to meet the criteria for emergency admission, giving the findings on which that conclusion is based and directing that a law enforcement officer take the person into custody and deliver him to the nearest receiving facility

for emergency examination and treatment. The order of the court shall be made a part of the patient's clinical record; or

2. A law enforcement officer may take a person who appears to meet the criteria for emergency admission into custody and deliver him to the nearest receiving facility for emergency examination and treatment. The officer shall execute a written report detailing the circumstances under which the person was taken into custody, and the report shall be made a part of the patient's clinical record; or

3. A mental health professional may execute a certificate that he has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for emergency admission, stating the observations upon which that conclusion is based. The mental health professional's certificate shall authorize a law enforcement officer to take the person into custody and deliver him to the nearest available receiving facility for emergency examination and treatment. The law enforcement officer shall execute a written report detailing the circumstances under which the person was taken into custody. The report and mental health professional's certificate shall be made a part of the patient's clinical record.

(c) *Emergency examination.*—A patient who is admitted for an emergency examination and treatment by a receiving facility shall be examined by a mental health professional without unnecessary delay, and may be given such treatment as is indicated by good medical practice.

(d) *Release of patient.*—At any time the examining mental health professional concludes that the patient need not be retained in a receiving facility or that further evaluation is not necessary, the patient shall be discharged immediately unless the patient is under criminal charges, in which case he shall be returned to the custody of a law enforcement officer. The patient must be released within 48 hours of his



admission except when the examining mental health professional concludes that there is reason to believe that the patient may require evaluation or treatment, in which case, unless the patient voluntarily gives express and informed consent to evaluation or treatment, a proceeding for court-ordered evaluation or involuntary placement shall be initiated.

## (2) COURT-ORDERED EVALUATION.—

(a) *Criteria.*—A person may be admitted to, or retained in, a receiving facility for evaluation if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injure himself or others if allowed to remain at liberty; or
2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself and that such neglect or refusal poses a real and present threat of substantial harm to his well being.

(b) *Initiation of proceeding.*—A court-ordered evaluation may be initiated as follows:

1. Any person may file with the court a petition, executed under oath and supported by affidavits of two additional persons, requesting an evaluation of a person located in the county who is alleged to meet the criteria for a court-ordered evaluation; or
2. Any person may file with the court a petition executed under oath alleging that a person in the county meets the criteria for a court-ordered evaluation. The petition must be accompanied by the certificate of a mental health professional stating that he has examined the patient within the preceding 5 days and has found that the patient may be mentally ill and requires placement in a receiving facility for full evaluation.

(c) *Notice; hearing on petition.*—The judge shall set a hearing on the petition and shall serve notice of the time and place of such hearing on the patient, his guardian, if one has previously been appointed, and the person, if any, having custody and control of the patient. In the absence of a guardian, two other representatives for the service of the notice shall be designated by the court, one of whom, other than the person who filed the petition, shall be selected in the following order:

1. The patient's spouse;
2. An adult child;
3. Parent;
4. Adult next of kin;
5. Adult friend;
6. Appropriate human rights advocacy committee as defined in §20.19; or
7. The department.

The second representative shall be selected from the above list without regard to the order of listing, except that the department shall only be selected as the representative of last resort in cases where the patient is receiving services in a state-operated facility. The court shall make such efforts, as in its discretion it determines reasonable in view of the emergency, to contact the persons listed above in the order listed. The court shall notify any other person, including any persons whose names appear in the patient's court file, that the judge believes has a concern for the patient's welfare. The hearing shall be set within 5 days of the date of mailing the notice with a copy of the petition attached. The court shall grant a continuance upon application by the patient, his guardian, or a representative if such continuance is found necessary to permit preparation for the hear-



ing. The hearing may be waived in writing by the patient. The patient and his guardian or representatives shall be informed of the right to counsel by the judge, and, if the patient cannot afford an attorney to represent him at the hearing, the judge shall appoint one. The patient shall be consulted with regard to the appointment of a representative and have authority to request that an appointed representative be replaced.

(d) *Order for evaluation.*—After a hearing or, if the hearing is waived by express and informed consent of the patient or his guardian, after a review of all evidence, if the judge is satisfied that immediate evaluation is necessary, he shall issue an order to any law enforcement officer, if other less restrictive means are not available, to deliver the patient to a receiving facility for evaluation. If the judge is satisfied that evaluation is necessary, but that the patient need not be retained in a receiving facility immediately for his own safety or that of others, he may order the patient to appear at a designated receiving facility at a specified time within 3 days. If the patient fails to appear at the specified time, the order of the court, countersigned by the administrator of the facility to show that the person did not appear as ordered, shall authorize and direct any law enforcement officer to take the person into custody and deliver him to the specified receiving facility.

(e) *Evaluation by a receiving facility.*—A patient who is admitted to a receiving facility may be detained for a period not to exceed 5 days. The staff members of all receiving facilities shall encourage patients to apply for voluntary placement if placement appears necessary. Within the 5-day evaluating period one of the following actions shall be taken based on the individual needs of the patient:

1. The patient shall be released;

2. The patient shall be released for outpatient treatment by a community facility;

3. The patient shall give express and informed consent to placement as a voluntary patient; or

4. Proceedings for involuntary placement shall be initiated.

The least restrictive form of treatment shall be made available when determined by a receiving facility mental health professional to be necessary.

(3) **DISCHARGE OF PATIENT.**—At any time the patient is found not to require retention in a receiving facility for emergency treatment or evaluation, the receiving facility shall discharge the patient unless the patient is under criminal charges, in which case he shall be returned to the custody of a law enforcement officer. Notice of the discharge shall be given to the patient's guardian or representatives, to any mental health professional who executed a certificate admitting the patient to the receiving facility, and to any court which ordered the patient's evaluation.

### **394.465 Voluntary admissions.—**

#### **(1) AUTHORITY TO RECEIVE PATIENTS.—**

(a) A facility may receive for observation, diagnosis, or treatment any individual 18 years of age or older making application by express and informed consent for admission or any individual age 17 or under for whom such application is made by his parent or guardian pursuant to §394.467. If found to show evidence of mental illness and to be suitable for treatment, such person 18 years of age or older may be admitted to the facility.

(b) A facility may admit for evaluation, diagnosis, or treatment any individual who makes application by express and

informed consent therefor; however, any individual age 17 or under may be admitted only after a hearing to verify the voluntariness of the consent. If such individual is under 18 years of age, his parent or guardian may apply for his discharge, and the administrator shall release the patient within 3 days of such application for discharge.

**(2) RIGHT OF VOLUNTARY PATIENTS TO DISCHARGE.—**

(a) A facility shall discharge a voluntary patient who has sufficiently improved so that retention in the facility is no longer desirable. A patient may also be discharged to the care of a community facility. A voluntary patient or his guardian, representative, or attorney may request discharge in writing at any time following admission to the facility. This request may be submitted to a member of the staff of the facility for transmittal to the administrator. If the patient, or another on his behalf, makes an oral request for release to a staff member, such request shall be immediately entered in the patient's clinical record, and the patient must within 8 hours be given counseling and assistance in preparing a written request. If a written request is submitted to a staff member, it shall be delivered to the administrator within 16 hours. Within 3 days of delivery of a written request for release to the administrator, the patient must be discharged from the facility or a plan instituted for a discharge of the patient. Such plan shall be approved by the patient. If the administrator determines that the patient meets the criteria for involuntary placement, proceedings for involuntary placement must be initiated within 3 days of delivery of the written request, exclusive of weekends and legal holidays. If the patient was admitted on his own application and the request for discharge is made by a person other than the patient, the discharge may be conditioned upon the express and informed consent of the patient.

If the patient is under the age of 18, his parents or guardian may act for him.

(b) If the administrator, upon the advice of the patient's attending mental health professional, determines that the patient needs to be transferred to a longterm treatment facility and the patient refuses to go as a voluntary patient, the administrator shall be authorized to file a petition for involuntary placement.

**(3) NOTICE OF RIGHT TO RELEASE.—**At the time of his admission and each 6 months thereafter, a voluntary patient and his guardian or representatives shall be notified in writing of his right to apply for a discharge.

**(4) TRANSFER TO VOLUNTARY STATUS.—**Staff members of all treatment facilities shall encourage an involuntary patient to give express and informed consent to transfer to voluntary status unless the patient is under criminal charge, or unless the patient is unable to understand the nature of voluntary placement, or unless voluntary placement would be harmful to the patient, in which case a finding to this effect shall be entered in the patient's clinical record. Any involuntary patient who applies shall be transferred to voluntary status immediately, unless such transfer would not be in the best interest of the patient, in which case such finding shall be entered in the patient's clinical record and shall be subject to review every 90 days. When transfer to voluntary status occurs, notice shall be given to the patient and his guardian or representatives and, if the patient is involuntarily placed under an order of court, to the court which entered such order.

**(5) TRANSFER TO INVOLUNTARY STATUS.—**A patient who has given express and informed consent to be hospitalized as a voluntary patient, and upon arrival at the treatment facility, refuses to remain as a voluntary patient may be detained by the treatment facility for a period not to



exceed 3 days while the administrator of the treatment facility initiates procedures for involuntary placement.

### **394.467 Involuntary placement.—**

#### **(1) CRITERIA.—**

(a) A person who is acquitted of criminal charges because of a finding of not guilty by reason of insanity may be involuntarily hospitalized pursuant to such finding if he is mentally ill and, because of his illness, is manifestly dangerous to himself or others.

(b) Any other person may be involuntarily placed if he is mentally ill and, because of his illness, is:

1. Likely to injure himself or others if allowed to remain at liberty, or

2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being.

(2) **ADMISSION TO A TREATMENT FACILITY.**—A patient may be involuntarily placed in a treatment facility, after notice and hearing, upon recommendation of the administrator of a receiving facility where the patient has been admitted for examination or evaluation. When a patient is not an inpatient in a receiving facility, the administrator of a designated receiving facility may make a recommendation for involuntary placement of a patient who has been given an examination, evaluation, or treatment by staff of the receiving facility or a private mental health professional. The hearing may be waived by express and informed consent in writing by the patient. The recommendation must be supported by the opinions of two mental health professionals, at least one of whom shall be a physician, who have

personally examined the patient within the preceding 5 days that the criteria for involuntary placement are met. Such recommendation shall be entered on an involuntary placement certificate, which certificate shall authorize the receiving facility to retain the patient pending transfer to a treatment facility or completion of a hearing. The certificate shall be filed with the court in the county where the patient is located and shall serve as a petition for a hearing regarding involuntary placement. A copy of the certificate shall also be filed with the department and copies shall be served on the patient and his guardian or representatives, accompanied by:

(a) A written notice, in plain and simple language, that the patient or his guardian or representative may apply at any time for a hearing on the issue of the patient's need for involuntary placement if he has previously waived such a hearing.

(b) A petition for such hearing, which requires only the signature of the patient or his guardian or representative for completion.

(c) A written notice that the petition may be filed with a court in the county in which the patient is hospitalized at the time the certificate is executed and the name and address of the judge of such court.

(d) A written notice that the patient or his guardian or representative may apply immediately to the court to have an attorney appointed if the patient cannot afford one.

The petition may be filed in the county in which the patient is involuntarily placed at any time within 6 months of the date of the certificate. The hearing shall be held in the same county, and one of the patient's physicians at the facility shall appear as a witness at the hearing. If the hearing is waived, the court shall order the patient to be



transferred to the least restrictive type of treatment facility based on the individual needs of the patient, or, if he is at a treatment facility, that he be retained there. However, the patient can be immediately transferred to the treatment facility by waiving his hearing without awaiting the court order. The involuntary placement certificate shall serve as authorization for the patient to be transferred to a treatment facility and as authorization for the treatment facility to admit the patient. The treatment facility may retain a patient for a period not to exceed 6 months from the date of admission. If continued involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued involuntary placement.

### (3) PROCEDURE FOR HEARING ON INVOLUNTARY PLACEMENT.—

(a) If the patient does not waive a hearing or if the patient, his guardian, or a representative files a petition for a hearing after having waived it, the judge shall serve notice on the administrator of the facility in which the patient is placed and on the patient. The notice of hearing must specify the date, time, and place of hearing; the basis for detention; and the names of examining mental health professionals and other persons testifying in support of continued detention and the substance of their proposed testimony. The judge may serve notice on the state attorney of the judicial circuit of the county in which the patient is placed, who shall represent the state. The court shall hold the hearing within 5 days unless a continuance is granted. The patient, his guardian or representative, or the administrator may apply for a change of venue for the convenience of parties or witnesses or because of the condition of the patient. Venue may be ordered changed within the discretion of the court. The patient and his guardian or representative shall be informed of the right to counsel by the court. If the patient

cannot afford an attorney, the court shall appoint one. The patient's counsel shall have access to facility records and to facility personnel in defending the patient. One of the mental health professionals who executed the involuntary placement certificate shall be a witness. The patient and his guardian or representative shall be informed by the judge of the right to an independent expert examination by a mental health professional. If the patient cannot afford a mental health professional, the judge shall appoint one. If the court concludes that the patient meets the criteria for involuntary placement, the judge shall order that the patient be transferred to a treatment facility or, if the patient is at a treatment facility, that he be retained there or that he be treated at any other appropriate facility or service on an involuntary basis. The judge shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the judge finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate who shall act on the patient's behalf relating to the provision of express and informed consent to treatment. The order shall adequately document the nature and extent of a patient's mental illness. The judge may adjudicate a person incompetent pursuant to the provisions of this act at the hearing on involuntary placement. The treatment facility may accept and retain a patient admitted involuntarily for a period not to exceed 6 months whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness. Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient. If further involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued involuntary placement.

(b) The court shall provide a court order, a psychiatric evaluation, and other adequate documentation of each patient's mental illness to the administrator of a treatment

facility whenever a patient is ordered for involuntary placement, whether by civil or criminal court. The administrator of a treatment facility may refuse admission to any patient directed to its facilities on an involuntary basis, whether by civil or by criminal court order, who is not accompanied at the same time by adequate orders and documentation.

#### (4) PROCEDURE FOR CONTINUED INVOLUNTARY PLACEMENT.—

(a) If continued placement of an involuntary patient is necessary, the administrator shall, prior to the expiration of the period during which the treatment facility is authorized to retain the patient, request an order authorizing continued involuntary placement. This request shall be accompanied by a statement from the patient's mental health professional justifying the request and a brief summary of the patient's treatment during the time he was involuntarily placed. In addition, the administrator shall submit an individualized plan for the patient for whom it is requesting continued involuntary placement. Notification of this request for retention shall be mailed to the patient and his guardian or representative along with a completed petition, requiring only a signature, for a hearing regarding the continued hospitalization and a waiver-of-hearing form. The waiver-of-hearing form shall require express and informed consent and shall state that the patient is entitled to a hearing under the law; that he is entitled to be represented by an attorney at the hearing and, if he cannot afford an attorney, that one will be appointed; and that, if it is shown at the hearing that the patient does not meet the criteria for involuntary placement, he is entitled to be released. If the patient or his guardian or representative does not sign the petition, or if the patient does not sign a waiver within 15 days, the hearing officer shall notice a hearing with regard to the patient involved in accordance with §120.57(1).

(b) Any time continued involuntary placement is requested, the hearing officer may, on his own motion, notice a hearing.

(c) Any time continued involuntary placement is requested by the administrator, the administrator may request a hearing, and the hearing officer shall hold a hearing within 30 days of such request.

(d) The administrator shall not transfer any patient to voluntary status when he has reasonable cause to believe that the patient is dangerous to himself or others. In any case in which the administrator has reasonable cause to believe that an involuntary patient is dangerous to himself or others, the administrator shall request continued involuntary placement. In any case in which a request for continued involuntary placement is necessary, but the administrator after reviewing the case believes there is not reasonable cause to believe that the patient meets the criteria for involuntary placement at the time of application for transfer to voluntary status and the patient needs continued placement, the patient shall be transferred to a voluntary status.

(e) If the patient or his guardian or representative returns the signed petition noted in paragraph (a), the hearing officer shall notice a hearing in accordance with §120.57(1). The patient and his guardian or representative shall be informed of the right to counsel by the hearing officer. In the event a patient cannot afford counsel in a hearing before a hearing officer, the public defender in the county where the hearing is to be held shall act as attorney for the patient. The hearing shall be conducted in accordance with chapter 120.

(f) If the patient by express and informed consent waives his hearing or if at a hearing it is shown that the patient continues to meet the criteria for involuntary placement, the



hearing officer shall sign the order for continued involuntary placement. The treatment facility shall be authorized to retain the patient for a period not to exceed 1 year. The same procedure shall be repeated prior to the expiration of each additional 1-year period the patient is retained.

(g) If continued involuntary placement is necessary for an individual admitted while serving a criminal sentence, but whose sentence is about to expire, or for an individual involuntarily placed while a minor, but who is about to reach the age of 18, the administrator shall petition the hearing officer for an order authorizing continued involuntary placement.

(h) At any hearing hereunder, the hearing examiner shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the hearing examiner finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate who shall act on the patient's behalf relating to the provision of express and informed consent to treatment. If the hearing examiner finds the patient is competent to consent to treatment, then the patient's competence shall be restored, and any guardian advocate previously appointed shall be discharged.

**394.468 Admission and release procedures.**—Admission and release procedures and treatment policies of the department are governed solely by this act. Such procedures and policies shall not be subject to control by court procedure rules. The matters within the purview of this act are deemed to be substantive, not procedural.

**394.469 Discharge of patients.**—

(1) **POWER TO DISCHARGE.**—At any time a patient is found no longer to meet the criteria for involuntary placement, the administrator may:

(a) Discharge the patient, unless the patient is under a criminal charge, in which case he shall be transferred to the custody of the appropriate law enforcement officer;

(b) Transfer the patient to voluntary status on his own authority or at the patient's request, unless the patient is under criminal charge; or

(c) Place an improved patient, except a patient under a criminal charge, on convalescent status in the care of a community facility.

(2) **NOTICE.**—Notice of discharge or transfer of status shall be given to the patient, his guardian or representatives, and, if the patient's involuntary placement was by order of a court, the court which entered such order.

(3) **CONVALESCENT STATUS; INVOLUNTARY PLACEMENT.**—An improved patient may be placed on convalescent status for a period of up to 1 year in the care of a less restrictive community facility when such action is in the best interest of the patient. Notice of the patient's placement on convalescent status shall be given to the patient and his guardian or representatives, to the community facility, and, if the patient's involuntary placement was by order of a court, to the court which entered the order. Placement on convalescent status shall include provisions for continuing responsibility by a community facility, including a plan for treatment on an outpatient basis. The administrator of the treatment facility from which the patient is given convalescent status may, at any time during the continuance of such convalescent status, return the patient to the treatment facility when the condition of the patient requires. An invol-



untary patient may be returned for the remainder of his authorized treatment period, and the treatment facility shall have up to 1 additional month during which to apply for continued involuntary placement.

**394.471 Validity of prior involuntary placement orders.**—No involuntary placement of a mentally ill person, lawful before January 1, 1972, shall be deemed unlawful because of the enactment of this part. The department shall establish reasonable rules to require the administrator of each treatment facility to apply for an order authorizing continued involuntary placement of any patient for whom involuntary placement is necessary and who was initially involuntarily placed under an order of a court prior to July 1, 1972. Such prior orders, unless superseded by an order under this part, shall remain valid until July 1, 1973, after which all such orders shall be null and void and of no effect, and every patient retained shall become a voluntary patient unless previously placed on involuntary status pursuant to procedures under this part. Nothing in this part invalidates any order appointing a guardian or determining incompetency.

**394.473 Attorneys' and mental health professionals' fees.**—

(1) In case of indigency of any person for whom an attorney is appointed pursuant to the provisions of this part, the attorney shall be entitled to a reasonable fee to be determined by the circuit judge and paid from the general fund of the county from which the patient was involuntarily detained. In case of indigency of any such person, the court may appoint a public defender. The public defender shall receive no additional compensation other than that usually paid his office.

(2) When any person who previously retained an attorney is adjudged incompetent, the guardian of such incompetent shall be required to pay a reasonable fee to such attorney retained by the incompetent.

(3) In case of indigency of any person for whom the appearance of a mental health professional is required in a court hearing pursuant to the provisions of this act, the mental health professional, except a mental health professional who is classified as a full-time employee of the state or who is receiving remuneration from the state for his time in attendance at the hearing, shall be entitled to a reasonable fee to be determined by the court and paid from the general fund of the county from which the patient was involuntarily detained.

**394.475 Acceptance, examination, and involuntary placement of Florida residents from out-of-state mental health authorities.**—

(1) Upon request of the state mental health authorities of another state, the Department of Health and Rehabilitative Services is authorized to accept as patients, for a period of not more than 15 days, persons who are and have been bona fide residents of Florida for a period of not less than 1 year.

(2) Any person received pursuant to subsection (1) shall be examined by the staff of the state facility where such patient has been accepted, which examination shall be completed during the said 15-day period.

(3) If upon examination such a person requires continued involuntary placement, a petition for a hearing regarding involuntary placement shall be filed with the circuit judge of the county wherein the treatment facility receiving the patient is located or the county where the patient is a resident.

(4) During the pendency of the examination period herein provided for and the pendency of the involuntary placement proceedings herein provided for, such person may continue to be detained 1983 or similar federal statute. Payment by the treatment facility unless the circuit judge having jurisdiction enters his order to the contrary.

**394.477 Residence requirements.**—No person shall be involuntarily placed in a facility under the provisions of this part who has not been a bona fide resident of the state continuously for 1 year immediately preceding his involuntary placement. However, any person not a bona fide resident of the state may be involuntarily placed in a treatment facility pending transfer of said person back to the state of his residence. An indigent nonresident patient shall be transferred to the state of his residence at the expense of the county from which he was involuntarily placed. The treatment facility, with the approval of the department, shall retain any nonresident who cannot be transferred subject to the provisions of this part.

**768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions.**—

(1) In accordance with §13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or

subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

(3) Except for a municipality, the affected agency or subdivision may, at its discretion, request the assistance of the Department of Insurance in the consideration, adjustment, and settlement of any claim under this act.

(4) Subject to the provisions of this section, any state agency or subdivision of the state shall have the right of appealing any award, compromise, settlement, or determination to the court of appropriate jurisdiction.

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and



paid pursuant to this act up to \$100,000 or \$200,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974.

(6) An action shall not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing. The failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted by counterclaim pursuant to §768.14.

(7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality, upon the Department of Insurance, and the department or the agency concerned shall have 30 days within which to plead thereto.

(8) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.

(9)(a) No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless

such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent of the state or its subdivisions shall be considered an adverse witness in a tort action for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damages suffered as a result of any act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard for human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(b) As used in this subsection, the term "employee" includes any volunteer firefighter.

(10) Laws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act.

(11) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues.



(12) No action may be brought against the state or any of its agencies or subdivisions by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of such riot, unlawful assembly, public demonstration, mob violence, or civil disobedience. Nothing in this act shall abridge traditional immunities pertaining to statements made in court.

(13) The state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section. Agencies or subdivisions, and sheriffs for the purpose of police professional liability only, which are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding. Sheriffs may join together as self-insurers to provide coverage for police professional liability claims only.

(14) This section, as amended by ch. 81-317, Laws of Florida, shall apply only to causes of action which accrue on or after October 1, 1981.

**768.30 Effectiveness.**—Section 768.28 shall take effect on July 1, 1974, for the executive departments of the state and on January 1, 1975, for all other agencies and subdivisions of the state, and shall apply only to incidents occurring on or after those dates.

## **SECTION 284.38, FLORIDA STATUTES (1981)**

**284.38 Waiver of sovereign immunity; effect.**—The insurance programs developed herein shall provide limits as established by the provisions of §768.28 if a tort claim. The limits provided in §768.28 shall not apply to a civil rights action arising under 42 U.S.C. 1983 or similar federal statute. Payment of a pending or future claim or judgment arising under any of said statutes may be made upon this act becoming a law, unless the officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally; however, the fund is authorized to pay all other court-ordered attorney's fees as provided under §284.31.

## **SECTION 20.19, FLORIDA STATUTES (1983)**

**20.19 Department of Health and Rehabilitative Services.**—There is created a Department of Health and Rehabilitative Services.

**(6) STATEWIDE HUMAN RIGHTS ADVOCACY COMMITTEE.**—

(a) There is hereby created within the department a statewide Human Rights Advocacy Committee consisting of eight citizens who broadly represent interests of the public and the clients of the department, to be appointed by the Governor. The members shall be representative of four groups of citizens as follows: two elected officials, including one county commissioner; two representatives of agencies or civic groups which are not designated as "federal" or "state"; two representatives from the health and rehabilitative ser-

vices consumer groups which are currently receiving, or have received, services from the department within the past 2 years; and two residents of the state who do not represent any of the foregoing groups or the department. At least one member of the Human Rights Advocacy Committee shall have served as a member of a district human rights advocacy committee within the 2 years prior to his appointment.

\* \* \*

(f) The responsibilities of the committee shall include, but are not limited to:

(1) Serving as a third-party mechanism for protecting the constitutional and human rights of any client within a program or facility operated, funded, or regulated by the department.

(2) Receiving, investigating, and resolving reports of abuses or deprivations of constitutional and human rights referred to the Human Rights Advocacy Committee by a district human rights advocacy committee. For the purposes of such investigation, the committee shall have access to all client files and reports when the client is receiving services through, and the files and reports are in the physical custody of, the Department of Health and Rehabilitative Services. In all other cases, the Human Rights Advocacy Committee shall have standing to petition the circuit court for access to client records which are confidential as specified by law. . . .

\* \* \*

6.(g) Procedures for Appeal. An appeal to the state committee is made by a district human rights advocacy committee when a valid complaint is not resolved at the district level. The statewide committee may appeal an unresolved complaint to the secretary. If, after exhausting all remedies, the statewide committee is not satisfied that the complaint can be resolved within the department, the appeal may be referred to the Governor.

\* \* \*

# (7) DISTRICT HUMAN RIGHTS ADVOCACY COMMITTEES.—

(a) At least one district human rights advocacy committee is created within each district. The number and areas of responsibility of the district human rights advocacy committees, not to exceed three in any district, shall be determined by the majority vote of district committee members. However, district II may have four committees.

(b) Each district human rights advocacy committee shall have no fewer than 7 and no more than 11 members who shall include at least two consumers, two providers, and two representatives of professional organizations. Priority consideration shall be given to the appointment of at least one medical or osteopathic physician as defined in chapters 458 and 459. Priority consideration shall also be given to the appointment of an individual whose primary interest, experience, or expertise lies with a major departmental client group not represented on the committee at the time of appointment. In no case shall a person who is employed by the department be selected as a member of the committee.

\* \* \*

(g) Each district human rights advocacy committee shall comply with appeal procedures established by the statewide Human Rights Advocacy Committee. The duties, actions, and procedures of both new and existing district or regional human rights advocacy committees shall conform to the provisions of this act. The duties of each district human rights advocacy committee shall include, but are not limited to:

(1) Serving as a third-party mechanism for protecting the constitutional and human rights of any client within a



program or facility operated, funded, or regulated by the department.

(2) Receiving, investigating, and resolving reports of abuse or deprivation of constitutional and human rights within the area of jurisdiction of the committee. For the purposes of such investigation, the committee shall have access to all client files and reports when the client is receiving services through, and the files and reports are in the physical custody of, the Department of Health and Rehabilitative Services. In all other cases, the Human Rights Advocacy Committee shall have standing to petition the circuit court for access to client records which are confidential as specified by law. . . .

4. Reviewing existing programs or services and new or revised programs of the department and making recommendations as to how the rights of clients are affected.

5. Appealing to the state committee any complaint unresolved at the district level.



**RESPONDENT'S**

**BRIEF**

**BEST AVAILABLE COPY**

### QUESTION PRESENTED

Whether Petitioners' "willful, wanton and reckless" confinement and treatment of Respondent without a hearing and without his informed consent constitutes a deprivation of Respondent's liberty without due process of law actionable under 42 U.S.C. § 1983.<sup>1</sup>

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<sup>1</sup>The question presented in Petitioners' Brief assumes too much. It assumes, for example, that the actions of the Petitioners were "random" and "unforeseeable". It also assumes that Respondent's complaint alleges a violation of procedural due process only. The lower court found that Petitioners' actions were not random within the context of this case, and in a specially concurring opinion, five of the judges below found that Respondent's complaint stated a substantive due process violation. (Pet.App. 1 et seq.). Furthermore, because this case involves an appeal of a dismissal pursuant to Rule 12(b)(6), the material allegations of the complaint are taken as true. (Pet.App. 3). The complaint alleges an intentional, involuntary commitment of Respondent by Petitioners without a hearing, which allegations are taken as true.



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	4
INTRODUCTION.....	4
I. THE ISSUE OF PROFESSIONAL JUDGMENT AS IT RELATES TO PREDEPRIVATION PROCESS WAS NOT RAISED IN THE LOWER COURT AND IS NOT RELEVANT TO ANY ISSUE RAISED ON APPEAL. THE FOURTEENTH AMENDMENT REQUIRES AN ADVERSARY HEARING PRIOR TO INVOLUNTARY CIVIL COMMITMENT AS THE LOWER COURT SO HELD .....	5
II. THE LOWER COURT CORRECTLY HELD THAT THE DECISIONS IN <i>PARRATT V. TAYLOR</i> AND ITS PROGENY DO NOT APPLY TO THIS CASE. ....	11
CONCLUSION.....	17

## TABLE OF AUTHORITIES

Cases	Page
<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).....	3, 7, 8, 9
<i>Augustine v. Doe</i> , 740 F.2d 322, (5th Cir. 1984) .....	13
<i>Bretz v. Kelman</i> , 773 F.2d 1026 (9th Cir. 1985).....	14
<i>Burch v. Apalachee Mental Health Services, Inc.</i> , 840 F.2d 797 (11th Cir. 1988).....	<i>passim</i>
<i>Burtneiks v. City of New York</i> , 716 F.2d 982 (2d Cir. 1983) .....	13
<i>Doe v. Austin</i> , 848 F.2d 1386 (6th Cir. 1988).....	8
<i>Freeman v. Blair</i> , 793 F.2d 166 (8th Cir. 1986).....	14
<i>Humphrey v. Cady</i> , 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972).....	7
<i>Ingraham v. Wright</i> , 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).....	3, 5, 9, 10
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).....	14, 15
<i>Loudermill v. Cleveland Board of Education</i> , 721 F.2d 550 (6th Cir. 1983), <i>aff'd</i> 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) .....	13
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	10
<i>Monell v. New York City Dept. of Social Services</i> , 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).....	11
<i>O'Connor v. Donaldson</i> , 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).....	2, 4, 7, 9, 17
<i>Parham v. J.R.</i> , 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).....	3, 5, 9, 10
<i>Parratt v. Taylor</i> , 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).....	<i>passim</i>
<i>Patterson v. Coughlin</i> , 761 F.2d 886 (2d Cir. 1985), <i>cert. denied</i> , 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 916 (1986).....	12, 13, 14
<i>Pembaur v. City of Cincinnati</i> , 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).....	11
<i>Sullivan v. Town of Salem</i> , 805 F.2d 81 (2d Cir. 1986) ..	11
<i>Vitek v. Jones</i> , 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).....	<i>passim</i>
<i>Watts v. Burkhardt</i> , 854 F.2d 839 (6th Cir. 1988) .....	13
<i>Wilson v. Civil Town of Clayton, Indiana</i> , 839 F.2d 375 (7th Cir. 1988).....	11, 13, 14

## Table of Authorities Continued

	Page
<i>Wolfenbarger v. Williams</i> , 774 F.2d 358 (10th Cir. 1985).	14
<i>Wolff v. McDonnell</i> , 418 U.S. 539, 94 S.Ct. 2693, 41 L.Ed.2d 935 (1974).....	12
<i>Youakim v. Miller</i> , 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976).....	5
CONSTITUTION, STATUTES, AND RULES	
Fourteenth Amendment, United States Constitution <i>passim</i>	
§ 394.467, Fla. Stat. (1981).....	9
§ 394.467(1)(b), Fla. Stat. (1981) .....	7
§ 394.467(1)(a), Fla. Stat. (1987) .....	7
42 U.S.C. § 1983 .....	i, 4, 14, 16
Rule 12(b)(6), Federal Rules of Civil Procedure .....	i, 16
Rule 34.1(a), Rules of the Supreme Court of the United States .....	5

## STATEMENT OF THE CASE

Petitioners assert that Respondent claims damages for violation of his Fourteenth Amendment right to procedural due process. (Pet. Br. 3). However, Respondent's complaint alleges violations of the Fourteenth Amendment without limiting the violations to its procedural due process component. (Pet.App. 191; 195; 202). The issue of whether a substantive due process violation occurred was fairly presented to the lower court and would therefore be an issue presented to this Court. (See Judge Johnson's specially concurring opinion in which Judges Vance, Kravitch, Hatchett and Tuttle join. Pet.App. 27 *et seq.*).

A series of inaccuracies relating to exhibits attached to the complaint are found in Petitioners' statement of the case.<sup>1</sup> (Pet.Br. 4). Exhibits A-1 and A-2 are the "voluntary" forms signed on December 7, 1981 at the behest of Apalachee Community Mental Health Services, Inc. (ACMHS) for commitment and treatment at ACMHS. (Resp.Br. App. A-1 and A-2). Exhibits C-1 and C-2 are the "voluntary" forms signed on December 10, 1981 at the behest of ACMHS for transfer to Florida State Hospital (FSH) for further commitment and treatment. (Resp.Br.App. A-5 and A-6). Exhibits E-1 and E-5 are the "voluntary" forms signed on December 10, 1981, and December 23, 1981, respectively, at the behest of FSH for commitment and treatment, respectively, at FSH. (Resp.Br.App. A-8 and A-12).

Attached as exhibit G to the complaint is a letter addressed to Respondent from the Florida Department of Health and Rehabilitative Services explaining the results

<sup>1</sup>The exhibits attached to the complaint are made part of the appendix to Respondent's brief. These exhibits are not included in the Petitioners' appendices. Respondent's appendix will be referred to as "Resp. Br.App.".

of an internal investigation into Respondent's allegations that he was committed and treated at FSH on the basis of "voluntary" forms which he did not remember signing. (Pet.App. 201; Resp.Br.App. A-21). In pertinent part, this letter reads:

[D]ocumentation that you were heavily medicated and disoriented on admission [was found] and [it was] concluded that you were probably not competent to be signing legal documents.

This matter was discussed at the Human Rights Advocacy Committee for Florida State Hospital meeting on August 4, 1983, and *hospital administration was made aware that they were very likely asking medicated clients to make decisions at a time when they were not mentally competent.* (Emphasis added).

Exhibit G is significant in this appeal in that it indicates an established state procedure for institutionalizing mentally incompetent patients on the basis of "voluntary" forms, thereby avoiding the due process mandated by the U.S. Constitution and the laws of the State of Florida. (See Judge Anderson's specially concurring opinion in which Judge Godbold joins. Pet.App. 47 *et seq.*).

#### SUMMARY OF ARGUMENT

This Court has repeatedly held that voluntary civil commitment involves a protected liberty interest and consequently requires due process protections. Though this Court has not to date defined the extent of the due process protections required prior to involuntary civil commitment, the procedural safeguards adopted in *Vitek v. Jones*, 445 U.S. 480 (1980), represent a starting point. In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), this Court also recognized that a finding of "mental illness" alone is insufficient to justify involuntary commitment by the

state. Other factual findings must be made, including a finding that the person whose commitment is sought cannot safely live in freedom even with the support of family and friends. These factual determinations must be supported by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418 (1979).

Petitioners claim that they made a professional judgment that Burch was competent to give informed consent to commitment and treatment, but that their professional judgment was wrong. Citing *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Parham v. J.R.*, 442 U.S. 584 (1979), Petitioners contend that their professional judgment of his competency to give informed consent, though erroneous, was all the predeprivation process Burch was due. In making this professional judgment argument, Petitioners have recast this appeal as an attack on Florida's voluntary commitment procedures.

For purposes of this appeal, Burch's commitment was an involuntary commitment without a hearing. Petitioners' argument concerning the constitutionality of Florida's voluntary commitment procedures is irrelevant to this appeal. Furthermore, with respect to involuntary civil commitments, a predeprivation adversary hearing is required by both the Fourteenth Amendment and Florida's Mental Health Act. *Vitek*, *supra*. Therefore, both *Ingraham* and *Parham* are inapplicable to this case.

The lower court correctly held that *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny are not applicable to this case. The lower court found that predeprivation process was not impracticable because the Petitioners were clothed with the authority to deprive Burch of his liberty and were in a position to predict that a hearing was required. The lower court's interpretation of *Parratt* is in conformity with the majority of the circuits.



Even using the more narrow interpretation of *Parratt* adopted by Judges Anderson and Godbold, Burch stated a procedural due process violation actionable under § 1983. In fact, if the complaint is construed liberally in conjunction with exhibit G attached to the complaint, the five dissenting judges would agree that the complaint states a claim for a procedural due process violation cognizable under § 1983.

The complaint also states a claim for a substantive due process violation. This is so because, after Petitioners held Burch beyond a reasonable time without a hearing and without a determination that he met the substantive requirements of *O'Connor* for involuntary civil commitment, their conduct was at odds with fundamental concepts of due process.

## ARGUMENT

### Introduction

Petitioners acknowledge that, for the purposes of this Court's review, the material allegations of the complaint are taken as true. Therefore, it is taken as true that Burch was involuntarily committed and treated by Petitioners without a hearing concerning the need for his commitment and treatment. (Pet.Br. 16). The lower court initially concluded that:

... Burch was not given the procedural process he was due before he was *involuntarily* committed to Florida State Hospital. (Emphasis added).

840 F.2d at 801 (Pet.App. 15).

Notwithstanding the involuntary nature of Burch's commitment and treatment for the purposes of this appeal, Petitioners argue, for the first time, that the voluntariness of Burch's commitment is now in issue. In

this context, Petitioners argue, again for the first time, that Petitioners made a professional judgment that Burch was competent to give informed consent, but that their judgment was wrong. (Pet.Br. 17-19). Citing *Ingraham v. Wright*, 430 U.S. 651 (1977) and *Parham v. J.R.*, 442 U.S. 584 (1979), Petitioners set forth as their primary argument that the professional judgment of Petitioners, albeit erroneous, is all the predeprivation process Burch was due. (Pet.Br. 17 *et seq.*)

Contrary to Petitioners' assertions, the constitutional adequacy of Florida's voluntary admission and treatment procedures has never been an issue in this case since Burch was committed as an involuntary patient for the purposes of this appeal.<sup>2</sup>

Although Respondent's counsel believes that this first argument of Petitioners is irrelevant to this appeal (and perhaps impermissible), he will address each legal issue presented by Petitioners in the order presented.

### 1. THE ISSUE OF PROFESSIONAL JUDGMENT AS IT RELATES TO PREDEPRIVATION PROCESS WAS NOT RAISED IN THE LOWER COURT AND IS NOT RELEVANT TO ANY ISSUE RAISED ON APPEAL. THE FOURTEENTH AMENDMENT REQUIRES AN ADVERSARY HEARING PRIOR TO INVOLUNTARY CIVIL COMMITMENT AS THE LOWER COURT SO HELD.

As indicated in the introduction *supra*, Petitioners' first argument is raised for the first time in this Court. Though

<sup>2</sup> Petitioners are not permitted in their brief to change the substance of the question presented in the petition for certiorari. Rule 34.1(a), Rules of the Supreme Court of the United States. Furthermore, this Court has held that, absent an exceptional case, it will not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976).

Petitioners acknowledge that the "requisite hearing was not afforded" (Pet.Br. 18), Petitioners nonetheless attempt to cast this appeal in terms of an attack on Florida's voluntary admission procedures (Pet.Br. 18, 19):

. . . Although Burch seeks only damages for a single due process violation, this suit, calling into question a medical and psychiatric judgment on his ability to give informed consent, is in effect an indirect attack upon Florida's voluntary placement procedures.

Burch is not attacking the facial validity of Florida's voluntary admission procedures any more than he is attacking the facial validity of Florida's involuntary admission procedures.<sup>3</sup>

In response to Petitioners' first argument, Burch is complaining about the absence of a hearing to determine

<sup>3</sup> Because the issue has been raised, the amici curiae in support of Respondent composed of the mental health organizations argue that prior to a voluntary admission, the Fourteenth Amendment requires, at a minimum, a professional judgment by a mental health professional of the patient's competency to give informed consent to admission and treatment. At the time of Burch's commitment (and at present) Florida law did not (and does not) require such a professional judgment. See Part I, The Florida Mental Health Act. (Pet.Br.App. A-1 et seq.).

In spite of Petitioners' assertions, a professional judgment of Burch's competency to give informed consent was not made. Petitioners did not cite any record reference to support their assertions on this subject. In fact, as the opinion below appears to indicate, the focus of inquiry was on whether Burch would sign "voluntary" and not on whether he was competent to do so. 840 F.2d. at 799 n.2. (Pet. App. 5). The conclusion that a professional judgment of Burch's competency to give informed consent was not made and that such judgments were not made as a matter of practice is supported by exhibit G attached to the complaint. As exhibit G indicates, the administration of FSH was admonished about "asking" patients to give informed consent when they were incompetent to do so. "Asking" patients for informed consent is a perfunctory act, not a professional judgment.

his need for involuntary commitment and treatment. Such a hearing is required by both the Fourteenth Amendment and Florida's Mental Health Act.

Involuntary civil commitment to a mental institution results in a "massive curtailment of liberty" which requires due process protection. *Vitek v. Jones*, 445 U.S. 480, 491-492, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980); *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972); *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1808-1809, 60 L.Ed.2d 323 (1979). This Court has also recognized that mental illness, in and of itself, is insufficient to justify involuntary civil commitment:

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that the term can be given a reasonably precise context and that "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

\* \* \*

In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.

*O'Connor v. Donaldson*, 422 U.S. 563, 575-576, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).<sup>4</sup>

<sup>4</sup> § 394.467(1)(b), Fla. Stat. (1981), appears to codify the substantive rights of the mentally ill recognized in *O'Connor*. (Pet.Br.App. A-28). The current version of this statute, § 394.467(1)(a), specifically refers to the nondangerous mentally ill person's right to be left alone if he can survive with the "help of willing and responsible family or friends, including available alternative services." (Resp.Br.App. A-22).



Though this Court has not to date stated what procedural safeguards are required prior to involuntary civil commitment, it is evident that some safeguards, including an adversary hearing, are required. In *Vitek v. Jones*, 445 U.S. at 494-497, a case involving the transfer of an inmate from a state prison to a mental hospital, this Court held that the following procedural safeguards were constitutionally required: Written notice to the prisoner that a transfer is being considered; a hearing, at which the state is required to disclose its evidence, and at which the prisoner is given an opportunity to be heard in person, to present documentary evidence, to present testimony of witnesses and to cross-examine the state's witnesses; an independent decisionmaker; a written finding by the factfinder; and competent assistance for the prisoner, furnished by the state if the prisoner is financially unable to furnish his own.

Because civil commitment of a non-prisoner involves an even greater liberty interest than the liberty interest implicated in *Vitek*, the procedural safeguards announced in *Vitek* would be the minimum permitted by the Constitution. See, e.g., *Doe v. Austin*, 848 F.2d 1386, 1393-1394 (6th Cir. 1988) ("If [Vitek's] basic safeguards are required before an inmate is transferred from a prison to a mental hospital, surely a person thought to be mentally retarded must be afforded at least the same level of protection before being removed from an ostensibly unfettered existence in society to the confines of an institution).

In *Addington v. Texas*, 441 U.S. 432-433, this Court held that, in a civil commitment proceeding, due process requires a higher standard of proof than the preponderance of the evidence standard used in other civil cases. Though the criminal standard of beyond a reasonable doubt is inappropriate in a civil commitment case, the

clear and convincing evidence standard would satisfy due process. *Id.*

With respect to involuntary placement, Florida's Mental Health Act in 1981 provided for an adversary judicial hearing, after notice, and court-appointed legal counsel for the indigent, and thus it appears to meet *Vitek's* basic standards for procedural due process.<sup>5</sup> Furthermore, Florida's Mental Health Act in 1981 provided for the substantive determinations required by *O'Connor*. See n.4, *supra*. For these reasons, and for the reason that Burch did not challenge the facial validity of Florida's procedures for involuntary placement, the lower court properly assumed that Florida's procedures for involuntary placement were constitutional. 840 F.2d at 801 n.8. (Pet.App. 13-14).

Because due process requires an adversary hearing prior to involuntary civil commitment, the cases of *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Parham v. J.R.*, 442 U.S. 584 (1979), are inapposite. In *Ingraham* this Court held that notice and a hearing were not required prior to the infliction of corporal punishment on school children. In so holding, this Court observed:

... Were it not for the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for

<sup>5</sup> § 394.467, Fla. Stat. (1981), does not specify the standard of proof applicable to involuntary placement. There is no reason to assume that a Florida court would not have construed the statute in light of *Addington*. (Pet.Br.App. A-28). The current version of § 394.467 requires findings to be made by clear and convincing evidence which comports with the holding in *Addington*. (Resp.Br.App. A-22 - A-28).



requiring advance procedural safeguards would be strong indeed. [footnote omitted].

*Id.*, 430 U.S. at 674.

In *Parham*, 442 U.S. at 613, this Court determined that a minor child had no constitutional right to an adversary "judicial-type" hearing prior to state administered mental health care voluntarily sought by the child's parents or legal guardian. As with *Ingraham*, *Parham* is distinguishable from this case primarily on the basis that an adversary predeprivation hearing is constitutionally due before involuntary civil commitment of an adult. In balancing the interests of the adult individual and the state, and in assessing the risk of error inherent in lesser procedural safeguards, *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), this Court has determined that an adversary predeprivation hearing is necessary before involuntary civil commitment of an adult to protect the individual from an erroneous decision which would massively curtail his liberty. *Vitek, supra*. In *Parham*, this Court found that there was insufficient reason to depart from the traditional belief that in the great majority of cases parents act in the best interests of their children. So long as the judgment of the parents is confirmed by an independent medical decision-making process which includes a complete psychiatric investigation, and the child's condition is periodically reviewed, due process does not require a predeprivation adversary hearing. *Parham*, 442 U.S. at 613.

The decisions in *Ingraham* and *Parham* are not applicable to this case. However, this case must be analyzed in light of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and its progeny.

## II. THE LOWER COURT CORRECTLY HELD THAT THE DECISIONS IN *PARRATT V. TAYLOR* AND ITS PROGENY DO NOT APPLY TO THIS CASE.

### A. Procedural Due Process.

1. The plurality opinion concluded that Burch stated a claim upon which relief could be granted for a procedural due process violation. 840 F.2d at 800. (Pet.App. 11). The Court distinguished *Parratt v. Taylor*, 451 U.S. 527 (1981), on the basis that its holding does not apply to procedural due process violations when the state is in a position to provide predeprivation process. 840 F.2d at 801. (Pet.App. 16). The Court reasoned that unlike the defendant in *Parratt*, the Petitioners were clothed with the authority to deprive Burch of his protected liberty interest. A predeprivation hearing was practicable because Petitioners could predict that one was required and, because of their state-clothed authority, they had a duty to provide one. *Id.* Furthermore, because of their state-clothed authority, Petitioners' actions were "fairly attributable" to the state.<sup>6</sup> The lower court also found that, having deprived Burch of a hearing, Petitioners deprived Burch of his liberty in a way not available to an

<sup>6</sup> The lower court's attribution of the Petitioners' acts to the state takes those acts outside the scope of *Parratt* for another reason. If the acts of Petitioners are fairly attributable to the state, then those acts are not random within the meaning of *Parratt*, but are sanctioned by the state within the meaning of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed. 452 (1986). If acts are fairly attributable to the governmental unit, then under *Monell* and *Pembaur* liability lies against the individual and the governmental unit and *Parratt* does not apply. *Wilson v. Civil Town of Clayton, Indiana*, 839 F.2d 375 (7th Cir. 1988); *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986).

ordinary citizen, thereby distinguishing Petitioners' actions from mere torts committed by state officials. *Id.*, at 803. The lower court cites *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed. 2d 916 (1986), in support of its interpretation of *Parratt*.

In *Patterson*, a prisoner sued state officials after he was placed in isolation for 65 days without a prior hearing conforming to the requirements of *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2693, 41 L.Ed.2d 935 (1974). The defendants in that case as here argued that *Parratt* required dismissal of the prisoner's § 1983 claim because the State of New York had constitutionally adequate procedures which were not followed by the defendants. Since adequate procedures were in place but not followed, the defendants in *Patterson* argued that their acts were unauthorized and a predeprivation hearing was not possible. However, the *Patterson* Court reasoned:

The requirements of the due process clauses are directed specifically to the federal and state governments. They require the promulgation of laws and regulations providing for regular procedures which the government must follow before it may deprive an individual of life, liberty or property. The execution of those laws and regulations also must conform to due process; otherwise the due process clause, with its guarantees of regular and predictable procedures, becomes a cipher. It is beyond cavil that due process requires more than the mere promulgation of laws and regulations which, if followed, would preserve the most fundamental of rights.

*Patterson*, 761 F.2d at 891.

In *Patterson* it was found that the officials who had the authority to grant the prisoner a hearing were the same persons who deprived him of his hearing. The Court held:

[A]lthough the denial of due process may have been "unauthorized", the deprivation of liberty at issue here does *not* appear to have been "unauthorized" as that term is meant by *Parratt*. [emphasis in original].

\* \* \*

Unlike the deprivation of property that occurred in *Parratt*, here the responsible state officials who had the power to grant appellant a hearing obviously knew that appellant was in peril of being deprived of his liberty interest. In fact, he was given a hearing, albeit a deficient one. Thus, the deprivation of liberty was neither "random" nor "unauthorized". See *Loudermill v. Cleveland Board of Education*, 721 F.2d 550, 562 (6th Cir. 1983), *aff'd*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 1487 (1985); *Burtneiks [v. City of New York]*, *supra*, 716 F.2d [1982] at 988-89.

*Patterson*, 761 F.2d at 892.

The Petitioners in this case had the authority to petition the Florida court for involuntary commitment and treatment of Burch. In fact, since the Petitioners had custody of Burch, they were the only ones in a position to do so.

The lower court's interpretation of *Parratt* and the interpretation by the *Patterson* court have wide support among the circuits. *Augustine v. Doe*, 740 F.2d 322, 327-328 (5th Cir. 1984) (The controlling question is whether the state is in a position to provide predeprivation process. Allegations that Defendants arrested Plaintiff without warrant and without probable cause sufficient to state a procedural due process claim); *Watts v. Burkhardt*, 854 F.2d 839, 843 (6th Cir. 1988) (Argument that conduct of members of state board of medical examiners which violated due process was random and unauthorized since state procedures, if followed, comport with due process misses the point of *Parratt*); *Wilson v. Civil Town*



of *Clayton, Indiana*, 839 F.2d 375, 382 (7th Cir. 1988) (Town's trustees "were employed at such high levels of local government that it would be feasible for the Town to provide an opportunity for a pre-deprivation hearing . . ."); *Freeman v. Blair*, 793 F.2d 166, 177 (8th Cir. 1986) ("These [defendants] knew what actions were going to be taken because they were responsible for making the decisions. Consequently, a predeprivation hearing easily could have been provided."); *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) ("The *Parratt* analysis . . . is simply inapplicable where the alleged deprivation is inextricable from the alleged corruption of the process which the state ordinarily could provide."); *Wolfenbarger v. Williams*, 774 F.2d 358, 363-365 (10th Cir. 1985) (Citing *Patterson* extensively the court held that a police officer who, upon the authority of the state attorney, returned stolen property to its purported owner without a judicial hearing, in the face of Plaintiff's claim of right to such property, and in contravention of a state statute, was amenable to suit under § 1983. *Parratt* did not apply because a predeprivation hearing was not only practicable but required by statute.).

The lower court correctly held that *Parratt* is not applicable to the facts of this case because predeprivation process was practicable. Its interpretation of *Parratt*'s holding is in conformity with the decisions based on similar facts in the majority of the circuits.

2. Judge Clark (separately) and Judge Anderson, joined by Judge Godbold, wrote concurring opinions expressing the view that Burch's claim is controlled by this Court's decision in *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

This Court in *Logan* appeared to only reiterate *Parratt*'s holding and therefore its limitations:

. . . In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure" 451 U.S., at 541, 101 S.Ct. 1908, 68 L.Ed.2d 420.

\* \* \*

In any event, the Court's decisions suggest that, absent "the necessity of quick action by the State or the impracticality of providing any pre-deprivation process," a post-deprivation hearing would be constitutionally inadequate. *Parratt*, 451 U.S., at 539, 101 S.Ct. 1908, 68 L.Ed.2d 420.

*Logan*, 455 U.S. at 435-436.

Judge Clark's concurring opinion concurs with the plurality opinion and does not move any appreciable distance from the plurality opinion in its interpretation of *Parratt*. On the other hand Judge Anderson's opinion, in which Judge Godbold joins, concurs in result only and relies on exhibit G attached to the complaint in order to find an exception to the rule of *Parratt*. Under Judge Anderson's construction of *Parratt*, Burch would have to show that FSH had an established procedure of depriving patients of their due process rights by obtaining voluntary consent forms when patients were clearly not competent to consent. 840 F.2d at 808-809. (Pet.App. 50-52). Judge Anderson allows that the complaint with the incorporated exhibit G makes such an allegation, especially in view of the fact that Burch has repeatedly made such an argument in his memoranda and briefs filed in the trial and



appellate courts. See n.1 of Judge Anderson's concurring opinion. 840 F.2d at 808-809. (Pet.App. 50-52).<sup>7</sup>

It appears that if the complaint is construed to contain an allegation that FSH had a practice or policy of averting judicial hearings by obtaining the consent to admission and treatment from patients it knew were incompetent to give informed consent, then the lower court would be unanimous in its opinion that Burch stated a claim for a procedural due process violation cognizable under § 1983. See n.7 *supra*. As the lower court noted, in the context of Rule 12(b)(6), the complaint should be construed liberally in favor of Burch. 840 F.2d at 798. (Pet.App. 3). Thus when read together, and when liberally construed, the complaint and exhibit G would make the requisite allegation to satisfy the dissent.

#### B. Substantive Due Process.

Judge Johnson, in an opinion in which Judges Vance, Kravitch, Hatchett and Tuttle join, concludes that Burch has also stated a claim for a substantive due process violation. The basis for this conclusion is that, when Petitioners held Burch beyond a reasonable time without a hearing, their actions rose to the level of conduct that is

<sup>7</sup> At en banc oral argument, counsel for Burch inquired of the court whether a bare allegation of such an established procedure by FSH would somehow be more reliable or legally sufficient than exhibit G, especially since Burch was not granted any opportunity at the trial level to amend his pleadings. Judge Tjoflat in his dissent answers this question: "If Burch's complaint did in fact contain such an allegation [that FSH had an established procedure of obtaining consents in lieu of judicial proceedings], I would agree that the *Parratt* analysis does not apply. I do not agree, however, with Judge Anderson's reading of the complaint. Judge Anderson relies heavily on a letter that Burch appended to his complaint as 'Exhibit G' . . ." 840 F.2d at 811, n.2.

"unjustified because it is, in and of itself, antithetical to fundamental notions of due process." 840 F.2d at 804. (Pet.App. 31).

Judge Johnson's conclusion is further supported by this Court's decision in *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975), in which, as noted in Part I hereinabove, this Court held that mental illness is insufficient of itself to justify commitment by the state. There must be a further showing that a person is either a danger to himself or others or that he is incapable of surviving safely in society even with the help of family or friends. *Id.* In Burch's case there was no finding by Petitioners or, of course, by a court that he met the substantive criteria for involuntary commitment. In fact, Dr. Zinerman found specifically that "[t]here is no indication of suicidal intent. [Burch] is probably depressed but at this time not much more than this can be assessed." (Exhibit F-5 of the complaint; Resp.Br.App. A-17).

The state could not indefinitely confine and treat Burch against his will merely on a finding that, for the moment, he was mentally ill. By doing so, Petitioners violated his substantive due process right to be free from prolonged restraint and unwanted treatment.

#### CONCLUSION

The opinion of the United States Court of Appeals for the Eleventh Circuit reversing the dismissal of the complaint against Petitioners should be affirmed. Should this Court reverse the Court of Appeals, Respondent requests that this Court remand the case to the Court of Appeals with instructions to permit Respondent to amend his complaint and for further proceedings thereon. Should this Court reverse the Court of Appeals and not permit Respondent to amend his complaint, Respondent

requests that this Court remand the case to the Court of Appeals for a ruling on whether Florida's postdeprivation remedies are adequate to satisfy due process.

Respectfully submitted,

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## APPENDIX



## Table Of Contents

	Page
<b>Exhibits to Complaint</b>	
Exhibit A-1 .....	A-1
Exhibit A-2 .....	A-2
Exhibit B-1 .....	A-3
Exhibit B-2 .....	A-4
Exhibit C-1 .....	A-5
Exhibit C-2 .....	A-6
Exhibit D .....	A-7
Exhibit E-1 .....	A-8
Exhibit E-2 .....	A-9
Exhibit E-3 .....	A-10
Exhibit E-4 .....	A-11
Exhibit E-5 .....	A-12
Exhibit F-1 .....	A-13
Exhibit F-2 .....	A-14
Exhibit F-3 .....	A-15
Exhibit F-4 .....	A-16
Exhibit F-5 .....	A-17
Exhibit F-6 .....	A-18
Exhibit F-7 (Deleted) .....	A-19
Exhibit F-8 .....	A-20
Exhibit G .....	A-21
§ 394.467 Fla. Stat. (1987) .....	A-22

A-1

**EXHIBIT A-1**

**STATE OF FLORIDA**

**DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES**

Facility: **Apalachee Community Mental Health Services**  
**P.O. Box 1782**  
**Tallahassee, Florida 32302**

**REQUEST FOR VOLUNTARY ADMISSION**

Dec. 7, 1981

I, *Ed Burch* do hereby request that (I) (he) (she) be admitted to *PATH* for observation, diagnosis, care and treatment of (my) (his) (her) mental condition, and I certify that the information given on this application is true and correct to the best of my knowledge and belief:

Age: *26*; Birthdate: *4/28/56*; Birthplace: *?*; Sex: *M*; Martial Status: *?*; Residence: *Tallahassee, Leon County, Florida*. Have you resided in Florida continuously during the past twelve (12) months immediately prior to date of this application? \_\_\_\_\_. Have you ever been placed for treatment of your mental condition? *Yes*. If answer is yes, list approximate dates, names and addresses of places. \_\_\_\_\_. If you are admitted to the above facility as a voluntary patient, do you agree to accept such treatment as may be prescribed by members of the medical and psychiatric staff in accordance with the provisions of expressed and informed consent and to abide by the rules of the said facility? *Yes*. I agree to pay as set forth on the attached agreement.

I understand that the above facility is authorized by law to detain me in the facility if necessary up to three (3) days after I have delivered a signed Application Release form (HRS-MH Form 3051) to the facility Administrator.

**Witnesses:**

/s/ Jennifer DeLoach

/s/ Ed Burch (Patient)

/s/Blondell Richardson

A-2

EXHIBIT A-2

DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES

Facility: Apalachee Community Mental Health Services  
P.O. Box 1782  
Tallahassee, Florida 32302

AUTHORIZATION FOR TREATMENT\*

I, the undersigned, a patient in *PATH* or I, the undersigned, a (parent of a minor) (guardian of) *Ed Burch* a patient in \_\_\_\_\_ facility, and the subject of this Authorization, hereby authorize the professional staff of the above stated facility to administer treatment, except electroconvulsive treatment. I have been informed that electroconvulsive treatment or surgical procedures requiring the use of general anesthetic shall not be performed without the additional consent of a patient, parent of a minor, or guardian. I have additionally been informed of: the purpose of treatment; common side effects thereof; alternative treatment modalities; approximate length of care; and that consent can be revoked orally or in writing prior to, or during the treatment period.

I have read and fully understand the above Authorization for Treatment. No guarantee or assurance has been made to me as to the results that may be obtained.

Dated this 7th day of Dec., 1981.

Witnesses:

/s/ Jennifer DeLoach

/s/ Ed Burch (Patient)

/s/ Blondell Richardson

A-3

EXHIBIT B-1

ACMHS EMERGENCY CONTACT SHEET

Client Name: Burch, Ed      Client #11069177  
Address: Transient  
DOB: 4/28/56      Workers: B. Richardson  
   J. DeLoach

Date: 12/7/81

NARRATIVE: This 25 yrs old W/M was brought into E/S by a man who found him wandering on the highway. Client appears unkept [sic], no shoes. Having difficulty answering questions.

Denises [sic] past mental health Tx or hospitalization, Initially admitted to mental health Tx when seen by doctor. Denises [sic] suicidal thinking when asked.

Gives little or no information.

Appears confused, thinks that he is in heaven, Whereabouts of family is unknown.

Denises [sic] any physical or medical problems.

Client was seen by Dr. Speer and evaluated:

ADMITT [sic] TO PATH.



A-4  
**EXHIBIT B-2**  
**CLOSING SUMMARY**  
**APALACHEE COMMUNITY MENTAL HEALTH**  
**SERVICES, INC.**

Client Name: Burch Darrell Ed. Client #11069177  
Last First M.I.

Admission Date: 12/7/81 Date of Last Contact: 12/10/81

Duration of Services: 3 days Date of Birth: 4/28/55

SS#: 264-27-4312 Sex: M Race: W

Education Level: Secondary

Services Provided: Crisis stabilization — 3 days; Individual therapy — several; Psychiatric Evaluation

Final Diagnosis: Paranoid Schizophrenia

DSMIII #295.30 Date: 12/10/81

*Summary of Problem/Condition:* This 26 year-old white single male from Tallahassee was referred to PATH by ACMHS — E.S. after he was found wandering on the highway disoriented. He appears to be hallucinating but was unable to relate content. Affect very flat with no apparent boundaries. No prior ACMHS tx. He allegedly escaped from a psychiatric hospital in Georgia.

*Service Summary:* (Include client's response to services, overall progress, referrals made during treatment, recommendations to client, follow-up plans, and attempts to notify/contact client and/or other involved providers regarding closing. Use reverse side if necessary.)

Client continued to appear psychotic during his stay at PATH. Chemotherapy was initiated in the form of Haldol 5mg. tid and 10mg. hs, later increased to 10mg. tid and 20mg hs, then decreased to 10mg, qid, as well as Cogentin 2mg. tid. However, he continued to remain disoriented, apparently paranoid, and in need of body space. He was also incontinent several x and had to be constantly directed to the bathroom. He appears marginally improved at this x and in need of longer stabilization than this facility is able to provide.

*Future Service Recommendations:* Continued chemotherapy and stabilization. Try to contact brother James Burch when stable re client's disposition.

*Prognosis:* Guarded.

*Reason for Closing:* Client in need of longer-term stabilization.

*Referral on Closing:* FSH

Case Manager:	Donald E. James	MA/CII	12/10/81
	Signature	Title	Date

A-5  
**EXHIBIT C-1**  
**STATE OF FLORIDA**  
**DEPARTMENT OF HEALTH AND**  
**REHABILITATIVE SERVICES**

Facility: \_\_\_\_\_

**REQUEST FOR VOLUNTARY ADMISSION**

12/10/81

I, *Darrell Ed Burch* do hereby request that I be admitted to *Florida State Hosp.* for observation, diagnosis, care and treatment of my mental condition, and I certify that the information given on this application is true and correct to the best of my knowledge and belief. Age: *26*; Birthdate: *4/28/52*. Birthplace: \_\_\_\_\_; Sex: *Male*; Martial Status: *Single*. Residence: *Transient*.

Have you resided in Florida continuously during the past twelve (12) months immediately prior to date of this application? \_\_\_\_\_. Have you ever been placed for treatment of your mental condition? \_\_\_\_\_. If answer is yes, list approximate dates, names and addresses of places. \_\_\_\_\_.

If you are admitted to the above facility as a voluntary patient, do you agree to accept such treatment as may be prescribed by prescribed by members of the medical and psychiatric staff in accordance with the provisions of expressed and informed consent and to abide by the rules of the said facility? *Yes*.

I agree to pay as set forth on the attached agreement.

I understand that the above facility is authorized by law to detain me in the Facility if necessary up three (3) days after I have delivered a signed Application Release form (HRS-MH Form 3051) to the facility Administrator.

Witnesses:

/s/ Donald E. James MA/CII    /s/ Darrell E. Burch (Patient)

/s/ B. Sellers

Accompanied patient to hospital FP

A-6

EXHIBIT C-2

STATE OF FLORIDA  
DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES

Facility: \_\_\_\_\_

AUTHORIZATION FOR TREATMENT\*

I, the undersigned, a patient in *Florida State Hospital* or I, the undersigned, a (parent of a minor) (guardian of) \_\_\_\_\_ a patient in \_\_\_\_\_ facility, and the subject of this Authorization, hereby authorize the professional staff of the above stated facility to administer treatment, except electroconvulsive treatment. I have been informed that electroconvulsive treatment or surgical procedures requiring the use of general anesthetic shall not be performed without the additional consent of a patient, parent of a minor, or guardian. I have additionally been informed of: the purpose of treatment; common side effects thereof; alternative treatment modalities; approximate length of care; and that consent can be revoked orally or in writing prior to, or during the treatment period.

I have read and fully understand the above Authorization for Treatment. No guarantee or assurance has been made to me as to the results that may be obtained.

Dated this 10th day of December, 1981

Witnesses:

/s/ Donald E. James MA/CII /s/ Darrell E. Burch (Patient)

/s/ B. Sellers

Accompanied patient to hospital FP

\*The patient shall always be asked to sign this authorization form. In addition, a representative, parent or guardian may be asked to give authorization.

A-7

EXHIBIT D

PSYCHIATRIC/MEDICAL NOTES

Client Name: Burch

Client #11069177

12/7/81 Ed is a young white male who was brought here by an automobile driver who picked Ed up and was concerned about Ed's functioning.

On interview at this time Ed is unable to provide any adequate history. He is blocking, appears to be hallucinating, slow reaction time. Grooming poor. Clearly psychotic. He relates past Rx but cannot give any history.

Imp: Paranoid schizophrenia

Plan: Rx with haldol and hopefully further evaluation when pt. improves.

C. Speer MD

12/8/81 Still quite inappropriate although easily redirected. Will increase his maintenance haldol to 10mg. tid, 20mg hs. If he does not begin to clear will consider FSH on 12/10. I think he will sign voluntary.

C. Speer MD

12/9/81 Still psychotic with blank stare, [illegible]; [illegible] still incontinent. Able to [illegible] today and follows direction more today according to staff.

[Signature illegible]

12/10/81 Ed looks very fragile to me. Still blocking, guarded. We are trying to reach family, thus far without success. Will still try. Ed looks overmedicated but still psychotic. I feel he will need longer term hospitalization to regroup.

C. Speer MD

A-8

EXHIBIT E-1

STATE OF FLORIDA  
DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES

Facility: **Florida State Hospital**

REQUEST FOR VOLUNTARY ADMISSION

December 10, 1981

I, *Darrell E. Burch* do hereby request that I be admitted to *Florida State Hospital* for observation, diagnosis, care and treatment of my mental condition, and I certify that the information given on this application is true and correct to the best of my knowledge and belief. Age: *26*; Birthdate: *4/28/52*. Birthplace: *Tallahassee, FL*; Sex: *Male*; Martial Status: *Separated*. Residence: *Transient*.

Have you resided in Florida continuously during the past twelve (12) months immediately prior to date of this application? \_\_\_\_\_. Have you ever been placed for treatment of your mental condition? \_\_\_\_\_. If answer is yes, list approximate dates, names and addresses of places. \_\_\_\_\_.

If you are admitted to the above facility as a voluntary patient, do you agree to accept such treatment as may be prescribed by prescribed by members of the medical and psychiatric staff in accordance with the provisions of expressed and informed consent and to abide by the rules of the said facility? *Yes*.

I agree to pay as set forth on the attached agreement.

I understand that the above facility is authorized by law to detain me in the Facility if necessary up three (3) days after I have delivered a signed Application Release form (HRS-MH Form 3051) to the facility Administrator.

Witnesses:

/s/ Janet V. Potter, ART

/s/ Darrell E. Burch (Patient)

/s/ Majorie R. Parker

A-9

EXHIBIT E-2

STATE OF FLORIDA  
DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES  
MENTAL HEALTH

Facility: \_\_\_\_\_

WAIVER OF RESPONSIBILITY-PERSONAL  
EFFECTS\*

Patient: *Darrell E. Burch*

GROUP 1-ARTICLES placed in Custody of the Facility  
\_\_\_\_\_. Attach additional sheets if necessary.

GROUP 2-Articles retained by Patient. 2 shirts, 1 pant, 1 sock,  
1 short, bedroom shoes. Attach additional sheets if necessary.

Group 1 above is a correct listing of my personal effects and belongings which I hereby place in custody of the facility. I hereby relieve the Facility and its employees for any loss or damage to such property where reasonable safety precautions have been taken.

I take full responsibility for keeping in my possession the articles listed in Group 2 above and any others brought to me while a patient here in the Facility.

Employee /s/ James J. Sweet  
12/10/81

Patient /s/ Darrell E. Burch  
12/10/81

If the patient is unable to sign the above waiver, the employee will record the reason below: . \_\_\_\_\_

\*Patient shall receive a copy with signatures.



A-10

**EXHIBIT E-3**  
**STATE OF FLORIDA**  
**DEPARTMENT OF HEALTH AND**  
**REHABILITATIVE SERVICES**

Facility: **Florida State Hospital**

**AUTHORIZATION FOR RELEASE OF INFORMATION**

I hereby authorize *Florida State Hospital* to release information from my medical records to the Social Security Administration and State of Florida Division of Family Services, if such release is deemed by the Administrator of the facility to be in my best interest. In addition, I authorize said facility to release to *local mental health clinics, Vocational Rehabilitation, or any family members Agency, Mental Health Professional, Attorney* information from my medical records, including psychiatric and psychological information.

I hereby release the facility from any liability which may arise as a result of the use of the information contained in the records released, and it will be presumed that if such information is later used to my damage that it was obtained as a result of this authorization.

Witness /s/ Janet V. Potter, ART  
12/10/81

Patient /s/ Darrell E. Burch  
12/10/81

RE: *Darrell E. Burch A104-876*  
*Patient's Name & Hospital Number*

A-11

**EXHIBIT E-4**  
**STATE OF FLORIDA**  
**DEPARTMENT OF HEALTH AND**  
**REHABILITATIVE SERVICES**

Facility: **Florida State Hospital**  
**Chattahoochee, Florida**

IN RE: BURCH, DARRELL E. A 104 876

**NOTICE OF PATIENT'S ADMISSION\***

YOU ARE HEREBY ADVISED that *Darrell E. Burch* was admitted to *Florida State Hospital, Chattahoochee, Florida 32324*; Telephone (904) 663-4311 on *December 10, 1981*, for treatment of mental illness. The nature of admission was *voluntary placement* and originated in the County of *Leon*. You are notified of this admission because you have been designated as the patient's (*representative*).

*December 11, 1981.*

/s/ Robert B. Williams [illegible] (Administrator)

cc: Dr. Winsor G. Schmidt  
HRAC Institute for Social Research  
Florida State University  
Tallahassee, FL 32306

\*Patient's guardian of representatives shall receive Notice of Admission.

cc: Guardian )  
First Representative ) when applicable  
Second Representative )

A-12  
EXHIBIT E-5  
STATE OF FLORIDA  
DEPARTMENT OF HEALTH AND  
REHABILITATIVE SERVICES

Facility: Florida State Hospital

AUTHORIZATION FOR TREATMENT\*

I, the undersigned, a patient in *Florida State Hospital* or I, the undersigned, a (parent of a minor) (guardian of) \_\_\_\_\_ a patient in \_\_\_\_\_ facility, and the subject of this Authorization, hereby authorize the professional staff of the above stated facility to administer treatment, except electroconvulsive treatment. I have been informed that electroconvulsive treatment or surgical procedures requiring the use of general anesthetic shall not be performed without the additional consent of a patient, parent of a minor, or guardian. I have additionally been informed of: the purpose of treatment; common side effects thereof; alternative treatment modalities; approximate length of care; and that consent can be revoked orally or in writing prior to, or during the treatment period.

I have read and fully understand the above Authorization for Treatment. No guarantee or assurance has been made to me as to the results that may be obtained.

Dated this 23rd day of Dec., 1981

Witness:

/s/ M. C. Zinerman, M.D.      /s/ Darrell E. Burch (Patient)

RE: DARRELL E. BURCH  
Patient's Name & Hospital Number

\* The patient shall always be asked to sign this authorization form. In addition, a representative, parent or guardian may be asked to give authorization.

A-13  
EXHIBIT F-1  
FLORIDA STATE HOSPITAL  
MEDICAL HISTORY AND PHYSICAL EXAMINATION

Date: 12/11/81      Age: 25      Sex: M  
Marital Status: separated      Occupation: \_\_\_\_\_

Family History: \_\_\_\_\_  
Review of Systems: Unable to give information due to mental condition  
Other: \_\_\_\_\_

GENERAL: Temp 98; Pulse 78; Respiration 20'; B/P 116/64; Wt. 140; Ht. 5'8"

APPEARANCE: Deformity of nose with deviation of cartilage to lt. side. Has dried blood on chest, feet, nares and mandible.

Development	Well-developed
Nourishment	Well-nourished
Stigmata	None
Body Type	Med. Height and Build
Fat and Hair Distribution	Normal
Skin, Hair, Nails	Normal
Peripheral Pulses	Palpable
Lymph Nodes	No lymphadenopathy

HEAD: Normocephalic

Skull	No masses
Eyes	Pupils, equal, round, react to L&A
Nose	Deviation of nasal septum—dried blood noted in nares—redness on left side of nose and left orbital rim with early evidence of ecchymoses
Mouth	No lesions
Teeth	Fair hygiene, few caries
Throat	Clear
Ears	TM's intact. Canals filled with cerumen

Instructions: To be completed by attending physician within 24 hours of admission.

Code: Normal—Abnormal—state findings. Not Examined—N.E.

Addressograph: Burch, Darrell E. A 104 876

A-14

## EXHIBIT F-2

## NECK AND CHEST

Thyroid  
Carotids  
Thorax

Neck—Supple  
Non-enlarged  
Pulsating—No Bruits  
Sym. in [illegible]  
Equal on expansion

## LUNGS

Percussion Auscultation Clear, resonant, no rales or rhonchi

## HEART

Size  
Rhythm  
Sound  
Force

WNL  
NSR  
No murmurs  
Strong

## BREASTS

Normal male breasts—no masses

## ABDOMEN

\*4-5 cm area of redness of skin noted on  
Rt. lower rib cage

Contour  
Masses  
Tenderness  
Rigidity  
Organs  
Scars

Flat  
None  
None  
None  
No organomegaly  
None

## GENITALIA AND RECTUM

Scars  
Malformations  
Pelvic Examination  
Rectal Examination

None  
—  
Non-tender—Non-enlarged prostate—  
no masses

## BONES, JOINTS AND SPINE

Posture  
Deformities  
Musculature  
Tonus  
Strength  
Tremors, Fibrillation  
Spasm  
Trigger Areas

St.  
None  
Normal  
Normal  
None

## NEUROLOGICAL

Cranial Nerves  
Motor  
Coordination  
Reflexes  
Sensory  
Gait  
Vibratory  
Romberg

Ess. intact  
Normal  
2+  
No. Def.  
Normal  
Normal  
neg.

If any positive findings, do a complete neurological

Summary and Diagnostic Impression: 12/11/81 Martha C. Stephens,  
DRNP

920 Bruise of Lt. nasal dorsum (Trauma) [illegible].  
Examiner [signature illegible]

A-15

## EXHIBIT F-3

## 1. Patient's stated reason for admission:

*Pt. confused unable to state reason for admission*

## 2. Patient Description:

- a) General physical condition: *slightly-built young man, healthy;*
- b) Posture: *normal — slightly rigid;*
- c) Facial expression: (Eye contact; consistent or inconsistent with verbal statements.) *stares;*
- d) Motor Activity: (Gait, tension relieving behaviors, rapidity of body movements, etc.) *somewhat rigid in movements*

## 3. Medical History:

- a) Does patient report having any acute or chronic medical problems? *No.*
- b) Is he/she currently being treated for any problem identified in a? \_\_\_\_\_
- c) Description of treatment and name of provider: \_\_\_\_\_
- d) Is patient taking any medications at present? *Yes.* If yes, please list name of medication and dosage: (Note time last dose was taken.) *See Chart-pschpotrophies.*
- e) Did patient bring any medication to hospital with him/her? *No.* If yes, list name and report disposition of medication (taken to pharmacy, etc.) \_\_\_\_\_
- f) Any obvious physical disabilities, handicaps and/or medical hazards: *Pt. has possible fracture of nose—early bruises chest.*  
Designate mode of travel: *Ambulatory*
- g) Current dental status: *poor*

Instruction: To be completed by Registered or Licensed Practical Nurse within 48 hours of admission

Adressograph: Burch, Darrell E.

A 104 876

Florida State Hospital

Nursing Assessment  
(Page 1 of 2)



## EXHIBIT F-4

## 4. Customary Habits of Daily Living:

a) Sleep: (Time of day/night he/she usually sleeps; length of time; presence of sleep disturbance, etc.)

*not able to give history*

b) Eating: (Number of meals, fluid preference, amount patient usually consumes, dietary restrictions, etc.)

*Unknown*

c) Elimination: *Unknown*

d) Smoking: (Does patient smoke? If so, quantity).

e) Use of alcohol/drugs: (Amount, frequency, substance)

## 5. Mental Functioning: (This should be assessed by observation and response to previous questions. Limit direct questioning to areas not able to be otherwise assessed.)

a) Orientation: Time, place, person (Circle, if yes)

b) Memory Intact: Recent, remote (Circle, if yes)

c) Thought content:

1. Irrational thoughts, if present: *God hit me*

2. Describe evidence of delusions/hallucinations? (Audio, visual, etc) *This is heaven*

3. Do thought processes follow logical sequence? *No*

d) Judgment: Is reported or observed behavior consistent with reality based decision making? *Poor judgment*

6. Assess patient's strengths: (Level of independence, abilities, interests, special aptitudes, etc.) *Pt young*7. Patient's perception of how nurses or other staff members can best help him/her move toward more effective patterns of living. *No perception at this time*8. Patient's stated goal of hospitalization:  
*unable to give*

## 9. Immediate identified problems requiring nursing intervention. (please prioritize)

1. *Assess bruises to chest wall and possible nose fracture.*

Date and Time: 12/11-81; 8:00 a.m.

Nurse's Signature: /s/ [illegible signature]

## EXHIBIT F-5

## FLORIDA STATE HOSPITAL — PSYCHIATRIC HISTORY

This 26 year old, white, male was admitted to FSH Unit 4, Ward B on 12/10/81. On admission the patient was disoriented, semi-mute, confused and bizarre in appearance and thought. He was not cooperative to the initial interview.

The patient had been admitted to PATH in Tallahassee through emergency services. He had been found wandering along the side of the highway. He was found to be extremely psychotic, appeared to be paranoid and hallucinating. Chemotherapy was initiated (Haldol, 5 mgs. t.i.d. and 10 mgs. h.s.) There were some changes made in attempts to have stabilize the patient but he did not show any change and was transferred to FSH. The patient was also incontinent of urine.

## MENTAL STATUS:

Since his admission to FSH the patient has continued to show disorientation, confusion and lack of insight. The patient was reported to have escaped from a mental hospital in Georgia. He has not been able to or willing to give background information or direct information related to his mental condition. He is delusional, hallucinating, and displays psychotic thought processes. The patient reported using Marijuana, Mushrooms, and Hash. There is no indication of suicidal intent. He is probably depressed but at this time not much more than this can be assessed.

## DIAGNOSIS:

Axis I: Schizophrenia, Undifferentiated Type, 295.9

Axis II: Schizoid Personality Disorder, 301.20

Axis III: None

Axis IV: 5—Severe

Axis V: 6—Very Poor

/s/ M.C. Zinnermon, M.D.

Attending Psychiatrist

Dictated: 12/29/81

Typed: 1/5/82

MCZ/db/T-6

Pt. Name: Darrell E. Burch

Number: A 104 876

Date of Admission: 12/10/81

Instructions: Attending psychiatrist dictates within 7 days of admission. Topics to be considered are Appearance and Behavior, Speech, Mood and Affect, Formal Thought Disturbance, Thought Content and Intellectual Functions.

A-18

EXHIBIT F-6

FLORIDA STATE HOSPITAL — WARD STAFF ADMISSION  
NOTE

Unit/Ward 4B

Name as shown on admission papers: *Burch, Darrell E.*

Race and Sex: *WM* Admission Date: *12/10/81*

S.S. #: *264-27-4312* Age: *25* Birthdate: *4/28/56*

County of admission: *Leon* Birthplace: *Tall., FL*

Citizenship: *U.S.* Years lived in Fla.: *Life*

Religion: *Christian* Marital Status: *Separated*

Education: *11th Grade* Mother's Name: *Evelyn Burch*

Father's Name: *James S. Burch* Occupation: *none*

Physician: *Dr. Zinerman* Veteran Status: *None*

Check if admission papers with patient.

*Yes. Voluntary, Competent.*

Brought from *PATH*. (Brought by: *Leon County Deputy*)

Time of admission: *3:30*

TPR: *98.78.20* BP: *116/64*

Ht.: *5'8"* Wt.: *140* Complexion: *Fair*

Suicidal ☐ Homicidal ☐ Criminal Charges ☐

Eyes: *Blue* Hair: *Brown* Body Build: *Med.*

Allergies according to patient and/or history: \_\_\_\_\_

Mode of Admission: *Ambulatory*

Prosthetic Appliances: (Include dentures, eye glasses) *None.*

What language does patient usually speak: *English*

Is he/she fluent in English? \_\_\_\_\_

Identifiable or suspected problems with hearing, vision, or  
other senses: \_\_\_\_\_

General Appearance: (Dress, hygiene, posture, gait, motor  
activity, behavior): *Quiet and cooperative on [illegible].*

Prefers to be called: *Darrell*

Instruction: Ward personnel complete at admission and send  
a copy to Medical Records Librarian immediately. Section on  
identifying marks to be completed at time of admission bath.

*Burch, Darrell E. A 104 876 — Addressograph*

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE  
FOR FILMING

*A-19*

## EXHIBIT F-8

## FLORIDA STATE HOSPITAL—PROGRESS NOTES

Date      Time

12/10/81      Pt. is refusing to cooperate. When asked questions that might indicate on what is going on he stares away. The pt. appears distressed and confused at this time. He related that medication has been helpful. This (haldol) will be continued. Further observations and evaluation will be made as the pt. feels more comfortable and clears.

Zinerman, M.D.

12/10      12:15      Client came ex. Leon Co. [illegible] remains quiet and cooperative since admission. Routine [illegible] was given and medications was order [sic] no problems. Con,'t to observed

J. Sweet C.A.

12/11/81 5:45 am      Pt. appears to have slept well during the night. Will cont. to observe & chart.

[signature illegible]

12/11/81 6:45 am      Pt. had a nose bleed. Bleeding profusely. Dr. Reyes notified. BP 78/110. Incident report filed.

[signature illegible]

12/11/81      Examined by Dr. Ramos in ER.

C. Hodges (PA)

Instructions: When a Progress Note is made, either S.O.A.P.E. or Narrative, indicate DATE and TIME. Sign each note with full signature and title. S.O.A.P.E. notes should include the Problem Number, Title, and all elements of S.O.A.P.E. Narrative Notes may be used when a notation is [illegible] Progress Notes, but a specific problem is [illegible] or several problems are involved.

Section 5/Filing Order 1/1980

Addressograph: Burch, Darrell E.



## EXHIBIT G

STATE OF FLORIDA  
DEPARTMENT OF HEALTH &  
REHABILITATION SERVICES

April 4, 1984

Mr. Darryl Burch  
c/o Rev. Peter Wood  
Post Office Box 2395  
Tallahassee, Florida 32304

Dear Mr. Burch:

As you requested, I am sending you the results of the Human Rights Advocacy Committee investigation into your complaint of June, 1983 against Florida State Hospital.

The first part of your complaint alleged that you were inappropriately admitted to Florida State Hospital and do not remember signing a voluntary admission form. Ms. Linda Weeks researched the records at the hospital and found your signature on the voluntary admission form signed on your arrival at Florida State Hospital. However, she also found documentation that you were heavily medicated and disoriented on admission and concluded that you were probably not competent to be signing legal documents.

This matter was discussed at the Human Rights Advocacy Committee for Florida State Hospital meeting on August 4, 1983 and hospital administration was made aware that they were very likely asking medicated clients to make decisions at a time when they were not mentally competent.

The second part of your complaint alleged that you were physically abused by Benny Johnson. Ms. Weeks was not able to substantiate this allegation as there was no documentation of any abuse complaint to the Abuse Registry or ward staff. The witness you named is no longer employed at the hospital. Let me point out that this does not mean the incident did not occur, only that we were not able to find any evidence that it had occurred.

If you need further information or feel there is anything more the Committee can do, please let me know.

Sincerely,

/s/ Rowe Hinton

Client Relations Coordinator

RH/rr

cc: Sharon Maxwell

Linda Weeks

## FLORIDA STATUTE 394.467 (1987)

## 394.467 Involuntary placement—

(1) **CRITERIA**—A person may be involuntarily placed for treatment upon a finding of the court by clear and convincing evidence that:

(a) He is mentally ill and because of his mental illness:

1.a He has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment; or

b. He is unable to determine for himself whether placement is necessary; and

2.a He is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, he is likely to suffer from neglect or refuse to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being; or

b. There is substantial likelihood that in the near future he will inflict serious bodily harm on himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and

(b) All available less restrictive treatment alternatives which would offer an opportunity for improvement of his condition have been judged to be inappropriate.

(2) **ADMISSION TO A TREATMENT FACILITY.**—

(a) A patient may be involuntarily placed in a treatment facility, after notice and hearing, upon recommendation of the administrator of a receiving facility where the patient has been examined. When a patient is not an inpatient in a receiving facility, the administrator of a designated receiving facility may make a recommendation for involuntary placement of a patient who has been given an examination, evaluation, or treatment by staff of the receiving facility or a private mental health professional upon receipt of the opinions referred to in paragraph (b). In a proceeding involving a person 18 years of age or older, the hearing

may be waived by express and informed consent in writing by the patient after the advice of counsel. In a proceeding involving a person under the age of 18, the hearing shall not be waived; however, if, at the hearing, the court finds that attendance at the hearing is not consistent with the best interests of the patient, the court may waive the presence of the patient from all or any portion of the hearing.

(b) The recommendation must be supported by the opinion of a psychiatrist and the second opinion of a clinical psychologist or another psychiatrist, both of whom have personally examined the patient within the preceding 5 days, that the criteria for involuntary placement are met; however, in counties of less than 50,000 population, if the administrator certifies that no psychiatrist or clinical psychologist is available to provide the second opinion, such second opinion may be provided by a licensed physician with postgraduate training and experience in diagnosis and treatment of mental and nervous disorders or by a psychiatric nurse. Such recommendation shall be entered on an involuntary placement certificate, which certificate shall authorize the receiving facility to retain the patient pending transfer to a treatment facility or completion of a hearing. The certificate shall be filed with the court in the county where the patient is located and shall serve as a petition for a hearing on involuntary placement. A copy of the certificate shall also be filed with the department; and copies shall be served on the patient and his guardian or representatives, accompanied by:

1. A written notice, in plain and simple language, that the patient or his guardian or representative may apply at any time for a hearing on the issue of the patient's need for involuntary placement if he has previously waived such a hearing.

2. A petition for such hearing, which requires only the signature of the patient or his guardian or representative for completion.

3. A written notice that the petition may be filed with a court in the county in which the patient is hospitalized and the name and address of the judge of such court.

4. A written notice that the patient has the right to be represented by counsel in the proceeding and that the

patient or his guardian or representative may apply immediately to the court to have an attorney appointed if the patient cannot afford one.

The petition may be filed in the county in which the patient is involuntarily placed at any time within 6 months of the date of the certificate. The hearing shall be held in the same county, and one of the patient's physicians at the facility shall appear as a witness at the hearing.

(c) If the hearing is waived, the court shall order that the patient be transferred to the least restrictive type of treatment facility based on the individual needs of the patient or, if he is at a treatment facility, that he be retained there. The patient may be immediately transferred to the treatment facility by waiving his hearing without awaiting the court order. If the patient waives his hearing, the involuntary placement certificate shall serve as authorization for the patient to be transferred to a treatment facility and as authorization for the treatment facility to admit the patient.

(d) The treatment facility may retain a patient for a period not to exceed 6 months from the date of the order for involuntary placement. If continued involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued involuntary placement.

### (3) PROCEDURE FOR HEARING ON INVOLUNTARY PLACEMENT—

(a) If the patient does not waive his right to a hearing on involuntary placement, or if the patient, his guardian, or a representative files a petition for such a hearing after having waived it as provided in paragraph (2)(c), the court shall serve notice on the administrator of the facility in which the patient is placed and on the patient. The notice of hearing shall specify the date, time, and place of hearing; the basis for detention; and the name of each examining expert and of every other person testifying in support of continued detention and the substance of their proposed testimony. The court shall serve notice on the state attorney of the judicial circuit of the county in which the patient is placed, who shall represent the state. The court shall hold the hearing within 5 days unless a continuance is



granted. The hearing shall be as convenient to the patient as may be consistent with orderly procedure and should be conducted in physical settings not likely to be injurious to the patient's condition. The court may appoint a master to preside. The patient, his guardian or representative, or the administrator may apply for a change of venue for the convenience of parties or witnesses or because of the condition of the patient. Venue may be ordered changed within the discretion of the court. The patient and his guardian or representative shall be informed of the right to counsel by the court. If the patient cannot afford an attorney, the court shall appoint one. The patient's counsel shall have access to facility records and to facility personnel in defending the patient. One of the professionals who executed the involuntary placement certificate shall be a witness. The patient and his guardian or representative shall be informed by the court of the right to an independent expert examination. If the patient cannot afford such an examination, the court shall provide for one.

(b) If the court concludes that the patient meets the criteria for involuntary placement, it shall order that the patient be transferred to a treatment facility or, if the patient is at a treatment facility, that he be retained there or that he be treated at any other appropriate facility or service on an involuntary basis. The order shall adequately document the nature and extent of the patient's mental illness.

(c) At the hearing on involuntary placement, the court shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the court finds that the patient is incompetent to consent to treatment, it shall appoint a guardian advocate who shall act on the patient's behalf relating to the provision of express and informed consent to treatment.

(d) The court may adjudicate a person incompetent pursuant to the provisions of chapter 744 at the hearing on involuntary placement.

(e) The treatment facility may accept and retain a patient admitted involuntarily for a period not to exceed 6 months whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness.

Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient. If further involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing continued involuntary placement.

(f) The court shall provide a court order, a psychiatric evaluation, and other adequate documentation of each patient's mental illness to the administrator of a treatment facility whenever a patient is ordered for involuntary placement, whether by civil or criminal court. The administrator of a treatment facility may refuse admission to any patient directed to its facilities on an involuntary basis, whether by civil or by criminal court order, who is not accompanied at the same time by adequate orders and documentation.

#### **(4) PROCEDURE FOR CONTINUED INVOLUNTARY PLACEMENT—**

(a) If continued placement of an involuntary patient is necessary, the administrator shall, prior to the expiration of the period during which the treatment facility is authorized to retain the patient, request an order authorizing continued involuntary placement. This request shall be accompanied by a statement from the patient's physician or clinical psychologist justifying the request and a brief summary of the patient's treatment during the time he was involuntarily placed. In addition, the administrator shall submit an individualized plan for the patient for whom he is requesting continued involuntary placement. Notification of this request for retention shall be mailed to the patient and his guardian or representative along with a completed petition, requiring only a signature, for a hearing regarding the continued hospitalization and a waiver-of-hearing form. The waiver-of-hearing form shall require express and informed consent and shall state that the patient is entitled to a hearing under the law; that he is entitled to be represented by an attorney at the hearing and, if he cannot afford an attorney, that one will be appointed; and that, if it is shown at the hearing that the patient does not meet the criteria for involuntary placement, he is entitled to be released. In a proceeding involving a person 18 years of age or older, the hearing may be



waived by express and informed consent in writing by the patient after the advice of counsel. If the patient or his guardian or representative does not sign the petition, or if the patient does not sign a waiver within 15 days, the hearing officer shall notice a hearing with regard to the patient involved in accordance with S. 120.57(1). In a proceeding involving a person under the age of 18, the hearing shall not be waived; however, if, at the hearing, the hearing examiner finds that attendance at the hearing is not consistent with the best interests of the patient, he may waive the presence of the patient from all or any portion of the hearing.

(b) Any time continued involuntary placement is requested, the hearing officer may, on his own motion, notice a hearing.

(c) Any time continued involuntary placement is requested by the administrator, the administrator may request a hearing; and the hearing officer shall hold a hearing within 30 days of such request.

(d) The administrator shall not transfer any patient to voluntary status when he has reasonable cause to believe that the patient is dangerous to himself or others. In any case in which the administrator has reasonable cause to believe that an involuntary patient is dangerous to himself or others, the administrator shall request continued involuntary placement. In any case in which a request for continued involuntary placement is necessary, but the administrator after reviewing the case believes there is not reasonable cause to believe that the patient meets the criteria for involuntary placement at the time of application for transfer to voluntary status and the patient needs continued placement, the patient shall be transferred to a voluntary status.

(e) If the patient or his guardian or representative returns the signed petition noted in paragraph (a), the hearing officer shall notice a hearing in accordance with S. 120.57(1). The patient and his guardian or representative shall be informed of the right to counsel by the hearing officer. In the event a patient cannot afford counsel in a hearing before a hearing officer, the public defender in the county where the hearing is to be held shall act as attorney

for the patient. The hearing shall be conducted in accordance with chapter 120.

(f) If the patient by express and informed consent waives his hearing after the advice of counsel or if at a hearing it is shown that the patient continues to meet the criteria for involuntary placement, the hearing officer shall sign the order for continued involuntary placement. The treatment facility shall be authorized to retain the patient for a period not to exceed 6 months. The same procedure shall be repeated prior to the expiration of each additional 6-month period the patient is retained.

(g) If continued involuntary placement is necessary for an individual admitted while serving a criminal sentence, but whose sentence is about to expire, or for an individual involuntarily placed while a minor, but who is about to reach the age of 18, the administrator shall petition the hearing officer for an order authorizing continued involuntary placement.

(h) At any hearing hereunder for a patient who has been previously adjudicated incompetent to consent to treatment, the hearing examiner shall consider testimony and evidence regarding the patient's competence. If the hearing examiner finds evidence that the patient is competent to consent to treatment, he may issue to the court in which the patient was adjudicated incompetent to consent to treatment a recommended order that the patient's competence be restored and that any guardian advocate previously appointed be discharged.

**History.**— s. 9, ch. 71-131; s. 8, ch. 73-133; ss. 3, 4; ch. 74-233; s. 1, ch. 75-305; s. 17, ch. 77-121; s. 205, ch. 77-147; s. 1, ch. 77-174; ss. 2, 8, ch. 77-312; s. 19, ch. 78-95; s. 1, ch. 78-197; s. 9, ch. 79-298; s. 2, ch. 79-336; ss. 2, 4, ch. 80-75; s. 12, ch. 82-212; s. 9, ch. 84-285; s. 28, ch. 85-167.

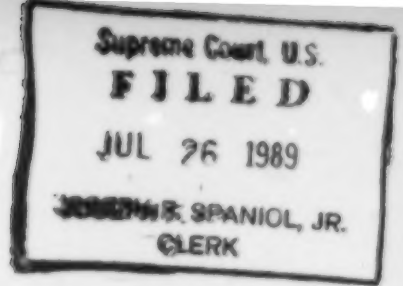
cf.—s. 916.15 Hospitalization of defendant adjudicated not guilty by reason of insanity.

s. 945.46 initiation of involuntary placement proceedings with respect to a mentally ill inmate scheduled for release.

**REPLY**

**BRIEF**

9  
No. 87-1965



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In The  
**Supreme Court of the United States**

October Term, 1988

MARLUS C. ZINERMON, M.D., et al.  
*Petitioners,*

v.

DARRELL BURCH,  
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT**

---

**PETITIONERS' REPLY BRIEF**

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## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	iii
PETITIONERS RESPONSE TO RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED AND RESPONDENT'S STATEMENT OF THE CASE AND INTRODUCTION . . . . .	1
STATEMENT OF THE CASE	
INTRODUCTION	
ARGUMENT . . . . .	5
I. THE ALLEGATION THAT A HEARING WAS NOT HELD PRIOR TO BURCH'S "COMMITMENT" DOES NOT ALONE SUFFICE TO STATE A CLAIM FOR RELIEF UNDER § 1983. THE CORRECT DUE PROCESS ANALYSIS MUST TAKE INTO ACCOUNT THE UNCERTAINTY OF THE PROFESSIONAL JUDGMENT AND THE ADEQUACY OF THE STATE'S POSTDEPRIV- ATION REMEDIES . . . . .	5
A. The Issue of Professional Judgment Is Raised by the Complaint, by the Plurality Opinion Below and by the Petition for Certiorari . . .	5
B. Where a Professional Judgment is Questioned, the Balance of Patient and State Interests Requires Focus on the Adequacy of Postdeprivation Remedies . . . . .	7

II. POSTDEPRIVATION REMEDIES UNDER  
FLORIDA LAW ARE ADEQUATE TO PROVIDE  
BURCH DUE PROCESS . . . . . 9

III. THE DECISION BELOW CANNOT BE  
RECONCILED WITH THIS COURT'S  
DECISIONS IN PARRATT V. TAYLOR AND RE-  
LATED CASES . . . . . 11

A. This Court's Decisions in Parratt and Hudson  
are Controlling . . . . . 11

B. This Court's Decision in Logan Does Not  
Govern the Present Case . . . . . 15

IV. THE COMPLAINT STATES NO CLAIM BASED  
ON A VIOLATION OF SUBSTANTIVE DUE  
PROCESS . . . . . 17

TABLE OF AUTHORITIES

Case	Page
<i>Addington v. Texas</i> , 441 U.S. 418 (1979) . . . .	7, 8, 13, 17
<i>Bretz v. Kelman</i> , 773 F.2d 1026 (9th Cir. 1985) . . . . .	12
<i>City of Canton, Ohio v. Harris</i> , ____ U.S. ____, 57 USLW 4270 (1985) . . . . .	5
<i>City of Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985) . .	16
<i>Collins v. King</i> , 743 F.2d 248 (5th Cir. 1984) . . . . .	13
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986) . . . . .	14, 17
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986) . . . . .	14
<i>DeShaney v. Winnebago Co. Dept. of Social Services</i> , ____ U.S. ____, 57 USLW 4218 (1989) . . . . .	17
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976) . . . . .	14
<i>Everett v. Florida Institute of Technology</i> , 503 So.2d 1382 (Fla. 5th DCA 1987) app. dismissed, 511 So.2d 998 (Fla. 1987) . . . . .	7, 9
<i>Freeman v. Blair</i> , 793 F.2d 166 (8th Cir. 1986) . . . . .	12
<i>Fullman v. Graddick</i> , 739 F.2d 553 (11th Cir. 1984) . . .	16
<i>Holloway v. Walker</i> , 784 F.2d 1287 (5th Cir. 186), cert. denied, ____ U.S. ____, 107 S.Ct. 571 (1986) . . . . .	13
<i>Hudson v. Palmer</i> , 468 U.S. 517 (1984) . . . 11, 12, 13, 14, 15	
<i>In re Beverly</i> , 342 So.2d 481 (Fla. 1977) . . . . .	8
<i>LeRoy Fibre Co. v. Chicago M. &amp; St. P.R. Co.</i> , 232 U.S. 340 (1914) . . . . .	14
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982) . .	15

<i>Neff v. State</i> , 356 So.2d 901 (Fla. 1st DCA 1978) . . . . .	8
<i>O'Connor v. Donaldson</i> , 422 U.S. 563 (1975) . . . . .	16
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979) . . . . .	7, 8, 9
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981) . . . . .	13, 14, 15, 17
<i>Patterson v. Coughlin</i> , 761 F.2d 886 (1985) . . . . .	13
<i>Schexnayder v. State</i> , 495 So.2d 850 (Fla. 1st DCA 1986) .	8
<i>Toney-El v. Franzen</i> , 777 F.2d 1224 (7th Cir. 1985) . . .	12
<i>Vinson v. Campbell County Fiscal Court</i> , 820 F.2d 194 (6th Cir. 1987) . . . . .	12
<i>Wadhams v. Proconier</i> , 772 F.2d 75 (4th Cir. 1985) . . .	12
<i>Watts v. Burkhart</i> , 854 F.2d 839 (6th Cir. 1988) . . . . .	12
<i>Wolfenbarger v. Williams</i> , 774 F.2d 358 (10th Cir. 1985)	12
<i>Wolff v. McDonnell</i> , 418 U.S. 539, 560 (1974) . . . . .	7
<i>Yates v. Jamison</i> , 782 F.2d 1182 (4th Cir. 1986) . . . . .	12
<i>Youngblood v. Romeo</i> , 459 U.S. 307 (1982) . . . . .	8, 11, 14, 17

#### UNITED STATES CODE ANNOTATED

42 U.S.C. § 1983 . . . . .	5, 9, 14
----------------------------	----------

#### FLORIDA STATUTES (1981)

§ 394.455(2) . . . . .	7
§ 394.455(22) Florida Statutes . . . . .	7
§ 394.459(3)(a) . . . . .	10, 11
§ 394.459(13) . . . . .	9
§ 394.467(1)(b) . . . . .	8
§ 394.467(3)(a) . . . . .	10

#### OTHER AUTHORITIES

2A Moore's Federal Practice, § 8.167(4) . . . . .	16
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No. 87-1965

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In The

**Supreme Court of the United States**

October Term, 1988

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MARLUS C. ZINERMON, M.D., et al.*Petitioners,*

v.

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DARRELL BURCH,*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT**

---

**PETITIONERS' REPLY BRIEF**

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**Petitioners' Response to Respondent's Restatement  
of the Question Presented and Respondent's  
Statement of the Case and Introduction****1. Restatement of the Question Presented**

Respondent Burch contends that the question presented in petitioners' brief improperly assumes that petitioners' actions — accepting him as a voluntary patient rather than subjecting him to involuntary commitment proceedings — were "random" and "unforeseeable" (Resp. Br. n.1). There is no question here but that if Burch was not competent to consent he was entitled to the protections afforded by invol-

untary commitment proceedings. But the complaint alleges that petitioners erred in their judgment<sup>1</sup> and "willfully, wantonly and recklessly" deprived Burch of a hearing. Whether petitioners' acts as alleged reflect medical misjudgment, disregard of their judgment or failure to make a judgment, they are random and unforeseeable to the State. The sense of the opinions of the district court (Pet. App. 136-137) and the Eleventh Circuit panel (Pet. App. 128) is that petitioners' acts were random and unforeseeable. The plurality opinion would rule that if a state actor had authority to determine whether consent is voluntary and informed, his failure to properly do so could not, as a matter of law, be random and unforeseeable. (Pet. App. 17, n.9).

Whether petitioners' acts are *rightly* characterized as random and unforeseeable is therefore a question of law. It is a question raised and addressed in the petition for writ of certiorari, and it is the question on which this Court granted certiorari. Petitioners did not reformulate the question in their brief.

Burch also argues that the question presented ignores his substantive due process argument (Resp. Br. n.1). The Court of Appeals did not decide this case on substantive due process grounds, only five of thirteen judges saw that as a *potential* issue and even they acknowledged the complaint would require amendment to state such a claim (Pet. App. 27, 32). Petitioners therefore have properly not raised an issue of substantive due process.<sup>2</sup>

1 Paragraph 27 of the complaint alleges that "Defendants, and each of them, knew or should have known, that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH." (Pet. App. 201)

2 Burch acknowledged this in his brief in opposition to the petition for certiorari saying "since this case was decided on procedural due process grounds, this is not the appropriate case in which to clarify substantive due process." (Br. in Opp. at 3)

Respondent's reformulation of the question presented and, indeed, his entire argument, seeks to separate the legal decision (whether to afford a patient a hearing) from the medical decision (whether the patient is able to give his informed consent to admission). As shown, *infra*, this does not lead to a proper due process analysis.

## 2. Statement of the Case

Respondent again suggests substantive due process is an issue. But, as stated, only five of thirteen judges thought this a possibility. The argument was *expressly rejected* by two judges who joined the plurality and by the five in dissent, all of whom stated Burch never alleged or intended to allege a violation of substantive due process (Pet. App. 47-48, 55, 57, 80 et. seq.). At oral argument, Burch's counsel, when questioned, admitted he had made no such claim (Pet. App. 55, 81).

Respondent also points to Exhibit G as reflecting a deprivation of Burch's rights pursuant to an "established state procedure" (Resp. Br. 2). There is *no* allegation in the complaint that petitioners were acting pursuant to an established state procedure. The complaint incorporated Exhibit G in support of an entirely different allegation. See Complaint, para. 27, Pet. App. 201. Only two of thirteen judges thought Burch had made out a deprivation pursuant to an established state procedure, and they placed virtually no reliance on the complaint (Pet. App. at 50, n. 1).

Burch never attempted to amend his complaint to state either of these claims in the seven months between the filing of the complaint and its dismissal. He had the right to do so as a matter of course and without leave of court under Rule 15, Fed. R. Civ. P., because petitioners filed only a motion to dismiss, not a responsive pleading.

### 3. Introduction

In the introduction to his brief, Burch states that "[p]etitioners argue, for the first time, that the voluntariness of Burch's commitment is now in issue," and they "argue, again for the first time, that Petitioners made a professional judgment that Burch was competent to give informed consent, but that their judgment was wrong" (Br. 4, ~~at~~ 5).

The complaint itself, however, attacks petitioners' professional judgment. Paragraph 27 alleges:

27. Defendants, and each of them, knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH. \*\*\*\*

If anything, this is an allegation that petitioners did not correctly exercise their professional judgment. Neither in paragraph 27 nor anywhere else in the complaint is there an explicit allegation that petitioners *failed* to exercise the requisite professional judgment.

The medical records attached to the complaint show that Burch was admitted as a voluntary patient. Because petitioners never filed an answer to the complaint, they cannot and do not assert here that Burch was *properly admitted* as a voluntary patient. They acknowledge that an involuntary commitment hearing was not held.

This case involves more than the issue of whether or not a commitment hearing was held, however, because a decision to hold a hearing turns on a medical/psychiatric judgment as to a patient's competency to give consent. The issue is not simply whether Burch was denied a hearing, but why. Petitioners raised exactly this point in their petition for certiorari (Pet. 36 et seq.), and Burch's brief in opposition

voiced no objection to it, his only response being that it was "argument on the *merits*." (Br. in Opp. 9). Burch's brief on the merits, however, never makes clear whether he believes he alleged that petitioners' judgment was erroneous or intentionally not made. The plurality opinion, and Burch's argument, would apply the same due process analysis to a professional misjudgment as to an intentional failure to make a judgment. We submit that analysis is wrong, and that the question is properly before this Court. See *City of Canton, Ohio v. Harris*, \_\_\_ U.S. \_\_\_, 57 USLW 4270, 4272 (1989).

The arguments that follow will address, as did the initial brief, both an erroneous exercise of professional judgment and the failure to exercise that judgment.

### ARGUMENT

#### I. THE ALLEGATION THAT A HEARING WAS NOT HELD PRIOR TO BURCH'S "COMMITMENT" DOES NOT ALONE SUFFICE TO STATE A CLAIM FOR RELIEF UNDER § 1983. THE CORRECT DUE PROCESS ANALYSIS MUST TAKE INTO ACCOUNT THE UNCERTAINTY OF THE PROFESSIONAL JUDGMENT AND THE ADEQUACY OF THE STATE'S POSTDEPRIVATION REMEDIES.

##### A. The Issue of Professional Judgment Is Raised by the Complaint, by the Plurality Opinion Below and by the Petition for Certiorari.

The issue of whether petitioners properly and correctly exercised their professional judgment is, as shown, raised



by paragraph 27 of the complaint. The plurality opinion below found that "the state had clothed the [petitioners] with the authority to deprive Burch of his liberty by enabling them to determine whether Burch had given his voluntary, knowing and express consent for admission" (Pet. App. 16-17). It attached no particular significance to the allegation that petitioners had acted with "willful, wanton and reckless" disregard of Burch's right to due process (Pet. App. 22). The plurality would hold petitioners liable because, in the exercise of their state clothed authority, they had not provided a judicial hearing for a person who was incapable of giving informed consent.<sup>3</sup> Whether in *their* judgment Burch was capable of informed consent is irrelevant. Burch's mere allegation that he was not is controlling. Nowhere did the plurality state that petitioners had made no effort to determine Burch's competency to consent.<sup>4</sup>

Burch argues that the Florida Mental Health Act<sup>5</sup> does not require that a professional judgment be made as to a patient's competency to give consent (Resp. Br. at 7, n. 4). This argument cannot supply an allegation that was not made — that petitioners failed to exercise their professional judgment — nor was it a factor in the plurality's opinion. In any event, petitioners strongly disagree with Burch's interpretation of Florida law. Section 394.465, Florida Statutes, (App. 25) permits admission on a voluntary basis only of

3 "Taking Burch's allegations as true, the appellees [petitioners] abused their state-clothed power by committing Burch to a mental institution without a hearing and without his voluntary, express, and informed consent." (Pet. App. 26)

4 In his brief, Burch now asserts such a professional judgment was not made. His complaint made no such allegation; indeed, Ex. E-5 (Resp. App. 12) reflects that Dr. Zinerman signed Burch's consent to treatment form. In paragraph 27 of the complaint, Burch clearly attacked petitioners' medical judgment. When the issue of professional judgment was discussed in the petition for certiorari, Burch's brief in opposition merely called this point "argument on the merits." (Br. in Opp. 9).

5 Chapter 394, Part I, Florida Statutes (1981) (App. 1 et seq.)

patients who can give "express and informed consent". This term is defined to require a knowing and willful decision without any element of force, fraud, deceit, duress or other form of constraint or coercion. See § 394.455(22), Florida Statutes (1981) (App. 5). A patient who cannot give such consent may not be admitted as a voluntary patient. See *Everett v. Florida Institute of Technology*, 503 So.2d 1382 (Fla. 5th DCA 1987), *app. dismissed*, 511 So.2d 998 (Fla. 1987). The Act does not specify who shall make the determination but it defines the term "mental health professional." See 394.455(2), Florida Statutes (1981) (App. 2). It stands to reason the determination must be made by a qualified mental health professional.

#### **B. Where a Professional Judgment is Questioned, the Balance of Patient and State Interests Requires Focus on the Adequacy of Postdeprivation Remedies.**

Burch contends that he was entitled to a hearing "prior to involuntary commitment." Petitioners do not take issue with the need for a hearing if Burch was not competent to consent to admission and treatment; indeed, they acknowledged it in their opening brief (Pet. Br. 17). But given the allegation of the complaint questioning their judgment, and the reasoning of the plurality opinion, we have asked the Court to consider the nature and context of the decision that was made, assuming petitioners erred. This is the correct due process analysis because the Court must weigh the interests of the patient and the State. See *Parham v. J.R.*, 442 U.S. 584, 608 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974).

As this Court has acknowledged, psychiatric diagnosis is inherently uncertain. See *Addington v. Texas*, 441 U.S. 418, 430 (1979). Exposing the petitioners and the State to unlimited liability for an erroneous professional judgment is

highly inappropriate, especially if Burch has an adequate remedy under Florida law. Moreover, neither Burch's brief nor those of the *amici curiae* pay the slightest heed to the effect on either the State or the mentally ill of a decision that would effectively compel the State to treat virtually all mental patients only after involuntary commitment proceedings.

The additional fiscal and administrative burdens and the diversion of scarce resources to the legal system weigh strongly against the sanction of a § 1983 suit.<sup>6</sup> Moreover, it is essential for the State to have some flexibility to accept patients on a voluntary basis. Many patients may reject treatment to avoid the stigma of being involuntarily committed to a mental institution. *Parham, supra*, at 600; *Addington, supra*, at 425-426. In other cases, the State may be unable to prove a mentally ill person meets the criteria for involuntary commitment<sup>7</sup> since it must do so by clear and convincing evidence. *Addington, supra*. A court may conceivably find that a person is mentally ill and in need of treatment but does not pose "a real and present threat of substantial harm" to himself without it.<sup>8</sup> A finding that a mentally ill person may not be involuntarily committed is not a finding that he can give informed consent. Such persons may go untreated unless the State assumes the risk of having its judgment later questioned in a § 1983 suit. See, e.g., *Schexnayder v. State*, 495 So.2d 850 (Fla. 1st DCA 1986); *Neff v. State*, 356 So.2d 901 (Fla. 1st DCA 1978); *In re Beverly*, 342 So.2d 481 (Fla. 1977). In all of these cases, Florida courts refused to commit persons with a significant degree of mental illness.

<sup>6</sup> See *Youngblood v. Romeo*, 457 U.S. 307, 321 (1982); *Parham v. J.R.*, 442 U.S. 584, 605-606 (1979).

<sup>7</sup> See § 394.467(1)(b), Florida Statutes (1981) (App. 28).

<sup>8</sup> *Id.*

Burch is a case in point. Had Burch had a hearing and not been involuntarily committed, the State could not have treated this pathetically ill man unless it accepted him as a voluntary patient. That would then have rendered FSH susceptible to the type of suit filed here.<sup>9</sup>

The State, of course, takes some risk in accepting such a patient, or any other voluntary patient, but its liability for damages and attorney's fees is not unlimited under state law. Treatment of mental patients on a voluntary basis is a desirable part of our health care system, but it will be severely restricted if mental health professionals are subject under § 1983 to unlimited liability for an error in professional judgment.

## II. POSTDEPRIVATION REMEDIES UNDER FLORIDA LAW ARE ADEQUATE TO PROVIDE BURCH DUE PROCESS.

Burch does not take issue with petitioners' argument that Florida law provides an adequate damages remedy and adequate procedures by which voluntary patients may leave the hospital or challenge their treatment or "confinement."<sup>10</sup> Neither his complaint nor his brief challenged the fairness or adequacy of Florida's remedies.

<sup>9</sup> Respondent may suggest that after a lengthy and unsuccessful involuntary commitment hearing, the court could make an ad hoc determination that the person is sufficiently competent to consent to treatment. This, of course, only continues the "time-consuming procedural minuet," see *Parham, supra*, at 605, to make what is, in the first instance, a medical decision — competency to consent to hospital admission and treatment.

<sup>10</sup> E.g., the required appointment of two representatives, the availability of habeas corpus proceedings which may be brought by the patient, his representative, or a relative, friend or guardian. See Pet. Br. at 13, 25-26, 31. Florida law also recognizes a cause of action for damages for negligence and false imprisonment. See § 394.459(13), Florida Statutes (1981) (App. 18) and *Everett, supra*, n. 6.



Burch's brief merely suggests, as does the brief of one *amicus curiae*, that by not having an involuntary commitment hearing, he was deprived of some unspecified alternative treatment, apparently non-institutional.<sup>11</sup> The *amicus* brief also contends that he was unable to challenge the treatment given him.<sup>12</sup>

The argument that Burch was deprived of a non-institutional treatment program cannot be taken seriously in view of what the medical records show. He was, as far as FSH knew, a transient.<sup>13</sup> He was clearly not in a state in which he could have functioned outside the hospital.<sup>14</sup> This is simply not a case in which it has been alleged, or could be alleged, that the State or its agents "warehoused" or otherwise confined a person who was capable of caring for himself.

An involuntary commitment hearing is not the point at which treatment is challenged. See § 394.467(3)(a), Florida Statutes (1981) (App.30). Nor is it the purpose of such a hearing to develop a therapeutic program. *Id.* Any patient may refuse treatment, at which point the hospital administrator must take certain steps. See § 394.459(3)(a) (App. 11). Thus, Burch was not deprived of any right to challenge his treatment by the lack of an involuntary hearing. The complaint does *not* allege that he was forcibly treated in viola-

<sup>11</sup> Resp. Br. at 8, n. 5; Brief of the American Orthopsychiatric Association et al. at 10, 15, 25.

<sup>12</sup> Brief of American Orthopsychiatric Association, et al. at 15.

<sup>13</sup> See Ex. C-1 to Complaint (Resp. App. 5).

<sup>14</sup> According to the records, Burch was initially disoriented, semi-mute, confused, hallucinating, and incontinent, and he displayed psychotic thought processes. (Ex. F-5) (Resp. App. 17). He had a possible nose fracture and chest bruises (Ex. F-3) (Resp. App. 15), and was covered with dried blood (Ex. F-1) (Resp. App. 13), probable indicators of having been beaten. If there were real alternatives to hospitalization at FSH, they have not been alleged in the complaint or argued in the brief.

tion of his rights or to his injury. It does not allege that he ever refused treatment and that FSH failed to take proper steps. Furthermore, Burch does not allege that the medical treatment he received was inappropriate or violated professional standards, see *Youngblood v. Romeo*, 459 U.S. 307, 323 (1982), or that he was treated at FSH longer than necessary.

Had Burch wanted to reject the treatment afforded him, he could have done so and petitioners would have been compelled to respect that decision and to follow prescribed procedures for continuing treatment. See § 394.459(3)(a) (App. 11). The absence of an involuntary commitment hearing did not deprive Burch of this right. Moreover, Burch fails to show what an involuntary commitment hearing would have accomplished in this case when he does not in any way attack the treatment that was given him.

### III. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN PARRATT V. TAYLOR AND RELATED CASES.

#### A. This Court's Decisions in *Parratt* and *Hudson* are Controlling.

It is indisputable that if petitioners failed to determine Burch's capability of consenting to admission and treatment and thereby "willfully" deprived him of a hearing for involuntary commitment, the State could not have anticipated or prevented such acts. Burch's cursory citation of selected cases in the circuit courts of appeals ignores the controlling effect of *Hudson v. Palmer*, 468 U.S. 517 (1984), which holds that in such instances the State may still afford due process and "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation



remedy." *Id.* at 433 (footnote omitted). *Hudson* specifically rejected the argument presented here:

[T]hat because an agent of the state who intends to deprive a person of his property "can provide predeprivation process then as a matter of due process, he must do so."\*\*\*\* Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

*Id.*

The thrust of Burch's argument is that any state actor who is authorized to provide predeprivation process cannot, by definition, commit a random and unauthorized act by failing to do so. Although this argument finds some support in a very few circuit court decisions, it cannot be reconciled with the plain language of *Hudson, supra*.<sup>15</sup> There are numerous cases that accept *Hudson's* controlling inquiry at face value.<sup>16</sup>

15 Most of the cases cited in Burch's brief are in fact decided on dissimilar grounds. In *Watts v. Burkhart*, 854 F.2d 839, 843 (6th Cir. 1988), the court found the actions complained of were taken pursuant to established state procedures. In *Freeman v. Blair*, 793 F.2d 166, 177 (8th Cir. 1986), the actions complained of were "decisions made by the highest officials in the executive branch of state government who [had] final authority ...." Such decisions, the court held, could not be "random and unauthorized acts." In *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985), the court held that a conspiracy by high officials to violate rights, by definition, is not a random act. Finally, in *Wolfenbarger v. Williams*, 774 F.2d 358, 363-365 (10th Cir. 1985), the defendant district attorney had the ultimate legal authority to establish certain policies. The act complained of was his conscious decision to alter established policies concerning stolen property.

Burch does not allege that petitioners had authority to change state policies at will, but simply that they disregarded a hearing requirement.

16 E.g., *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194 (6th Cir. 1987); *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986); *Wadhams v. Proconier*, 772 F.2d 75 (4th Cir. 1985); *Toney-El v. Franzen*, 777 F.2d 1224

Burch's particular reliance on *Patterson v. Coughlin*, 761 F.2d 886 (1985), is unwarranted. In *Patterson*, the court thought it significant to its decision that "the responsible state officials who had the power to grant appellant a hearing obviously knew that appellant was in peril of being deprived of his liberty interest [in avoiding punitive segregation from other prison inmates]." Unlike those officials, petitioners here were entitled to assume that Burch or his appointed representatives would exercise his statutory right to request discharge when he recovered. There is no allegation that petitioners acted maliciously or that they detained a well man. In fact, there is no allegation that Burch or his representative ever requested and was denied discharge by FSH.

The brief of the ACLU, as *amicus curiae*, argues categorically against the extension of *Hudson, supra*, and *Parratt v. Taylor*, 451 U.S. 527 (1981), to liberty deprivations because liberty, when lost, is irreplaceable. But a § 1983 action is no vehicle for replacing lost liberty, and, significantly, Burch does not argue that his damage remedies under Florida law are inadequate.

We have only asked the Court to consider the respondent's complaint, what is alleged and what is not. Here, the petitioners hospitalized and treated a sick person who was scarcely "at liberty" to begin with. See *Addington v. Texas*, 441 U.S. 418, 429 (1979). In the absence of any challenge whatsoever to that treatment, to the length of his stay or to the procedures by which Burch, his representatives, family or friends could have challenged his alleged confinement, or even an allegation that such procedures had to be used to effect his discharge, petitioners submit that the intrusion on his liberty was minimal. There is no allegation that

(7th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986); *Holloway v. Walker*, 784 F.2d 1237 (5th Cir. 1986), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 571 (1986); *Collins v. King*, 743 F.2d 248 (5th Cir. 1984).

anything done to Burch was medically unnecessary,<sup>17</sup> nor is there one allegation of fact in the complaint that reflects a real abuse of government power or that would support Burch's wholly conclusory claim that he was "willfully, wantonly and recklessly" deprived of his liberty. See *Daniels v. Williams*, 474 U.S. 327, 332-335 (1986). This effort to allege an intentional liberty deprivation is woefully weak. Intent is generally not inferred as to actions that are unlikely to cause harm, and hospitalization of an ill person is far from "substantially certain" to cause harm. *Davidson v. Cannon*, 474 U.S. 344, 353 n.2 (1986) (Blackmun, J., dissenting). What is alleged here is no more than the tort of false imprisonment.

The brief of the ACLU greatly exaggerates the potential reach of this case. We ask for no ruling that the rationale of *Parratt* and *Hudson* extends to all liberty deprivations but only that entailed in treating a pathetically ill person where no issue is raised as to the treatment, its necessity or duration; no credible claim is made that respondent could have functioned outside the hospital; and there is no challenge to the procedures by which respondent or others entitled to speak for him could have secured his release.<sup>18</sup>

<sup>17</sup> Burch was injured by the alleged disregard of his right to a hearing (Pet. App. 202), not any treatment. There are no allegations that treatment caused Burch any injury, and certainly none that it failed to meet applicable standards of professional judgment. See *Youngblood v. Romeo*, 457 U.S. 307, 323 (1982). Medical malpractice, which is likewise not alleged, provides no basis for a claim for relief under § 1983. *Estelle v. Gamble* 429 U.S. 97, 106 (1976).

<sup>18</sup> It does not aid the resolution of this case to contend, as does the ACLU, that our argument would encompass violations of substantive provisions of the Bill of Rights, see ACLU brief at 4, 28-30, or other outrageous actions against persons who are, in any event, fully "at liberty" to begin with. Contrary to what the ACLU suggests, it is certainly possible to distinguish under our Constitution between those who are unlawfully jailed and shot and those who are given medical treatment; between the mentally ill who are permanently "warehoused" and those who, as temporary patients, are treated and released. See *Daniels v. Williams*, 474 U.S. at 334-335 quoting *LeRoy Fibre Co. v. Chicago M. & St. P.R. Co.*, 232 U.S. 340, 354 (1914).

## B. This Court's Decision in *Logan* Does Not Govern the Present Case.

Nothing in respondent's discussion of *Logan v. Zimmermon Brush Co.*, 455 U.S. 422 (1982), refutes the argument made in petitioners' opening brief: that Burch's liberty loss was occasioned not by established state procedures but by the failure to faithfully observe those procedures.

Moreover, there is no allegation whatsoever in the complaint that Burch's loss was caused by established state procedures, and Burch offers no argument or authority for reading such an allegation into the complaint when 11 of the 13 judges who reviewed this case *en banc* could not do so. Acknowledging this, Burch relies exclusively on Exhibit G to the complaint, which was incorporated therein solely in support of an allegation attacking the exercise of petitioners' professional judgment,<sup>19</sup> not the operation or effect of established state procedures.<sup>20</sup>

To read an allegation of a deprivation pursuant to established state procedures into Burch's complaint would make a mockery of pleading requirements. Neither Exhibit G nor the allegations of the complaint amount to even *conclusory*

(Holmes, J., partially concurring) ("The whole law [depends upon differences of degree] as soon as it is civilized"). The *Hudson* and *Parratt* analysis of course would not apply to liberty deprivations violating substantive due process or to those for which the state provided no adequate remedy.

<sup>19</sup> See Pet. App. at 201 and Petitioners' Opening Brief at 38-39.

<sup>20</sup> For exactly this reason, Point I of the *amicus curiae* brief of the American Orthopsychiatric Association is not entitled to consideration. It argues that Burch's liberty deprivation was the result of established state procedures and statutory flaws. The point rests on a theory that was never pleaded and advances arguments that Burch never made and does not now make. In fact, to the contrary, Burch disclaims any constitutional attack on Florida's commitment procedures. Resp. Br. at 5-6.



pleading on established state procedures. Moreover, even if a conclusory allegation could be inferred, such pleading is simply not acceptable. 2A Moore's Federal Practice § 8.167(4) (2d Ed. 1987) and n. 11 (cases cited). See also *Fullman v. Graddick*, 739 F.2d 553, 556 (11th Cir. 1984) ("In civil rights and conspiracy actions, courts have recognized that more than mere conclusory notice pleading is required. . . . [A] complaint will be dismissed where the allegations it contains are vague and conclusory"). Moreover, a single incident, which is *all* that Burch alleges, cannot create an inference that a widespread practice exists. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

Burch's argument fails to explain why in the course of the seven months this case was in the district court he made no effort to amend the complaint. Nor does he cite one case that would support his "liberal construction" of the complaint or of Exhibit G, a document referenced in support of an entirely different theory.

#### IV. THE COMPLAINT STATES NO CLAIM BASED ON A VIOLATION OF SUBSTANTIVE DUE PROCESS.

As shown, *ante* pp. 2,3, Burch never alleged or intended to allege a violation of substantive due process. Eight of the judges below expressly rejected this proposition. To so read the complaint would violate the most basic rules of pleading. See 2A Moore's Federal Practice, *supra*, *Fullman v. Graddick*, *supra*.

Moreover, *O'Connor v. Donaldson*, 422 U.S. 563 (1975), in no way supports a claim of a violation of substantive due process. The patient in *O'Connor* suffered at most a slight degree of mental illness and apparently was capable of living in a non-institutional setting. No such claim has been or could be made by Burch. The suggestion in his brief that

he was only "depressed" and merely "for the moment . . . mentally ill" (Resp. Br. at 17) is completely belied by the medical records *incorporated* into the complaint as well as by the only claim he did clearly allege—that he was so mentally disturbed that he was *incapable* of consenting to admission and treatment at FSH.

The substantive component of the Fourteenth Amendment bars government actions that are so arbitrary, unfair or pernicious that they cannot be undertaken regardless of the fairness of the procedures used to implement them. *Daniels v. Williams*, 474 U.S. at 337, 338 (Stevens, J., concurring); *Parratt v. Taylor*, 451 U.S. at 545 (Blackmun, J., concurring). The complaint, and even Burch's arguments, (see Resp. Br. at 17) reflect nothing more than that FSH took in and treated an injured, helpless man. The complaint does not question that treatment and Burch cites no case holding that provision of medical treatment to one in need is "antithetical to fundamental notions of due process." *Parratt, supra*, at 545 (Blackmun, J., concurring).<sup>21</sup> That, indeed, would be a novel contention, but it is not one that was properly raised in this case.

Burch's argument, tending to downplay the seriousness of his condition, is belied by everything stated in and attached to the complaint. The state "has a legitimate interest . . . in providing care to its citizens who are unable to care for themselves . . . ." *Addington v. Texas, supra*, at 426. Substantive due process in fact requires that a state provide needed medical treatment when it assumes the responsibility of caring for an individual. See *DeShaney v. Winnebago*

<sup>21</sup> The five judges below who believed the complaint raised a substantive due process violation pointed specifically to allegations that defendant ACMHS "administered heavy medications to Burch with force and duress." (Pet. App. 29) No such allegation is made against the petitioners and, in any event, there was no allegation that any defendant violated the professional judgment standard of *Youngblood v. Romeo*, 457 U.S. 307 (1982), as to the treatment afforded Burch.



*Co. Dept. of Social Services*, \_\_ U.S. \_\_, 57 USLW 4218, 4220-4221 (1989).

Burch was clearly not, as he contends, confined indefinitely, nor were any legal proceedings needed to secure his release. In the absence of any stated attack on the treatment he received or its duration, Burch has no claim for violation of substantive due process.

### CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with instructions to reinstate the judgment for petitioners rendered by the district court.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONERS was served in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States Post Office or mailbox, with first-class postage pre-paid, addressed to:

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315 South Calhoun Street  
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\_\_\_\_\_/s/\_\_\_\_\_  
LOUIS F. HUBENER

**MOTION**

MOTION FILED  
JUN 26 1989

No. 87-1965 (6)

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

MARLUS C. ZINERMON, *et al.*,  
v. *Petitioners,*

DARRELL BURCH,  
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the Eleventh Circuit

MOTION OF THE  
AMERICAN ORTHOPSYCHIATRIC ASSOCIATION,  
THE NATIONAL MENTAL HEALTH ASSOCIATION,  
PROJECT SHARE, AND THE NATIONAL MENTAL  
HEALTH CONSUMER SELF-HELP CLEARINGHOUSE  
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*  
AND BRIEF AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENT

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June 26, 1989

39



IN THE  
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AMERICAN ORTHOPSYCHIATRIC ASSOCIATION,  
THE NATIONAL MENTAL HEALTH ASSOCIATION,  
PROJECT SHARE, AND THE NATIONAL MENTAL  
HEALTH CONSUMER SELF-HELP CLEARINGHOUSE  
TO FILE BRIEF AS *AMICI CURIAE***

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The American Orthopsychiatric Association, the National Mental Health Association, Project SHARE, and the National Mental Health Consumer Self-Help Clearinghouse hereby move, pursuant to Supreme Court Rule 36.3, for leave to file the accompanying brief as *amici curiae* in support of the respondent. Respondent has consented to the filing of this brief; petitioners have refused consent.

*Amici* are an organization of mental health professionals and three citizens' organizations, many of whose

members have direct experience working in state hospitals for the mentally ill or have been consumers of mental health services.\* Many members of these organizations—psychiatrists, psychologists, social workers, and psychiatric nurses—are charged with day-to-day responsibility for providing treatment to residents of state mental institutions and are familiar with the problems of institutionalized patients.

In their attempt to persuade this Court to reverse the judgment below, petitioners make far-reaching assertions and arguments about the due process rights of mentally ill persons committed to state facilities which, in the view of *amici*, are inaccurate. These assertions concern the adequacy of Florida statutory procedures, the degree of risk of erroneous deprivations of rights, whether a determination was ever made of respondent's ability to provide voluntary consent, and the probable effect of an affirmance by this Court upon state mental hospital procedures and conduct. *Amici* address these issues in the attached brief.

We respectfully request that the Court grant the American Orthopsychiatric Association, the National Mental Health Association, Project SHARE, and the Na-

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\* The American Orthopsychiatric Association is an interdisciplinary organization of over 8,000 members including psychiatrists, psychologists, social workers, psychiatric nurses, educators, and allied professionals, concerned with the problems, causes and treatment of abnormal behavior.

The National Mental Health Association is an organization of one million lay and professional members whose primary purpose is to encourage efforts to provide better services for the mentally ill.

Project SHARE (Self-Help and Advocacy Resource Exchange) is the largest mental health consumer-run organizing project in the United States.

The National Mental Health Consumer Self-Help Clearinghouse provides technical assistance to mental health consumer self-help groups across the nation.

tional Mental Health Consumer Self-Help Clearinghouse leave to file the accompanying brief as *amici*.

Respectfully submitted,

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	5
I. THE COMMITMENT OF BURCH UNDER VOLUNTARY ADMISSION PROCEDURES WHEN HE WAS INCAPABLE OF VOLUNTARILY GIVING EXPRESS AND INFORMED CONSENT WAS VERY LIKELY NOT A RANDOM ACT, BUT RATHER THE RESULT OF AN ESTABLISHED STATE PROCEDURE .....	5
A. The Procedural Scheme of the Florida Act Creates Incentives and Opportunities for the Abuse of Voluntary Commitment Procedures .....	6
1. Emergency Admission .....	6
2. Court-Ordered Evaluation.....	7
3. Involuntary Placement .....	8
4. Voluntary Admission.....	10
5. Consent to Treatment Provisions .....	13
6. Comparison of Procedures .....	14
B. Voluntary Commitment Is Actively Encouraged in Florida .....	16
C. A Number of Studies in Other States Demonstrate That Voluntary Admission Procedures Are Routinely Abused .....	17
D. The Number of Defendants and the Duration of the Alleged Misconduct Are Inconsistent With "Random" Action.....	21



## TABLE OF CONTENTS—Continued

	Page
II. DUE PROCESS AT LEAST REQUIRES THAT A QUALIFIED MENTAL HEALTH PROFESSIONAL MAKE A FORMAL THRESHOLD DETERMINATION OF THE VOLUNTARY AND INFORMED NATURE OF A PATIENT'S CONSENT TO VOLUNTARY ADMISSION AND TREATMENT .....	22
A. The Interests of the Individual .....	23
B. The Interests of the State .....	25
C. The Risk of Erroneous Deprivation and the Value of Additional Procedural Safeguards..	27
D. Balancing the Factors .....	28
CONCLUSION .....	30

## TABLE OF AUTHORITIES

Cases:	Page
<i>Addington v. Texas</i> , 441 U.S. 418 (1979) .....	24, 29
<i>Bentley v. State ex rel. Rogers</i> , 398 So. 2d 992 (Fla. Dist. Ct. App. 1981).....	13
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969) .....	24
<i>Covey v. Town of Somers</i> , 351 U.S. 141 (1956) .....	27
<i>Guardianship of Roe</i> , 383 Mass. 415, 421 N.E.2d 40 (1981) .....	23
<i>Hudson v. Palmer</i> , 468 U.S. 517 (1984) .....	3, 22, 29
<i>In re Beverly</i> , 342 So. 2d 481 (Fla. 1977) .....	10, 25
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977) .....	29
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982) .....	3
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976) .....	22, 23, 29
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961) .....	29
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972) .....	23
<i>O'Connor v. Donaldson</i> , 422 U.S. 563 (1975) .....	29
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979) .....	25, 29, 30
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981) .....	passim
<i>Rogers v. Commissioner of Dept. of Mental Health</i> , 390 Mass. 489, 458 N.E.2d 308 (1983) .....	23
<i>Williams v. Wilson</i> , 424 So. 2d 159 (Fla. Dist. Ct. App. 1982) .....	10
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975) .....	26
<i>Vitek v. Jones</i> , 445 U.S. 480 (1980) .....	24

## Statutes:

## United States Code:

42 U.S.C. § 1983 (1982) .....	passim
-------------------------------	--------

## Florida Statutes (1981):

§ 394.455 (2) .....	23
§ 394.455 (22) .....	11
§ 394.459 (3) .....	13
§ 394.459 (3) (a) .....	13, 23
§ 394.459 (12) (a) .....	12
§ 394.463 (1) (a) .....	6
§ 394.463 (1) (b) .....	7
§ 394.463 (1) (c) .....	7, 23
§ 394.463 (1) (d) .....	7

## TABLE OF AUTHORITIES—Continued

	Page
§ 394.463 (2) (a) .....	7
§ 394.463 (2) (b) .....	8
§ 394.463 (2) (c) .....	7, 8
§ 394.463 (2) (d) .....	8
§ 394.463 (2) (e) .....	8, 16
§ 394.465 (1) (a) .....	11
§ 394.465 (1) (b) .....	11, 27
§ 394.465 (2) (a) .....	12
§ 394.465 (3) .....	12
§ 394.465 (4) .....	17
§ 394.467 (1) (b) .....	9, 25
§ 394.467 (2) .....	7, 9
§ 394.467 (3) (a) .....	9, 10
§ 394.467 (4) .....	13
§ 394.467 (4) (a) .....	10
§ 394.467 (4) (d) .....	17
Florida Statutes (1985) :	
§ 394.455 (2) .....	23
Books :	
E. Beis, <i>Mental Health and the Law</i> (1984) .....	25
S. Brakel, J. Parry & B. Weiner, <i>The Mentally Disabled and the Law</i> (1985) .....	25
Articles :	
Appelbaum, Mirkin & Bateman, <i>Empirical Assessment of Competency to Consent to Psychiatric Hospitalization</i> , 130 Am. J. Psych. 1170 (1981) ..	19, 20, 28
Berg & Hammitt, <i>Assessing the Psychiatric Patient's Ability to Meet the Literacy Demands of Hospitalization</i> , 31 Hosp. & Comm. Psych. 266 (1980) .....	28
Gilboy & Schmidt, "Voluntary" Hospitalization of the Mentally Ill, 66 Nw. U.L. Rev. 429 (1971) ....	18, 19
Grossman & Summers, <i>A Study of the Capacity of Schizophrenic Patients to Give Informed Consent</i> , 31 Hosp. & Comm. Psych. 205 (1980) .....	28

## TABLE OF AUTHORITIES—Continued

	Page
Ensminger & Liguori, <i>The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential</i> , 6 J. Psych. & Law 5 (1978) .....	24
Legemaate, <i>Legal Aspects of Voluntary Psychiatric Hospitalization</i> , 11 Inter. J. Law & Psych. 259 (1988) .....	18
Olin & Olin, <i>Informed Consent in Voluntary Mental Hospital Admissions</i> , 132 Am. J. Psych. 938 (1975) .....	21, 28
Owens, <i>When is a Voluntary Commitment Really Voluntary?</i> , 47 Am. J. Orthopsych. 104 (1977) ..	18
Palmer & Wohl, <i>Voluntary Admission Forms: Does the Patient Know What He's Signing?</i> , 23 Hosp. & Comm. Psych. 250 (1972) .....	21
Szasz, <i>Voluntary Mental Hospitalization: An Unacknowledged Practice of Medical Fraud</i> , 287 New Eng. J. Med. 277 (1972) .....	18

**BRIEF FOR THE  
AMERICAN ORTHOPSYCHIATRIC ASSOCIATION,  
THE NATIONAL MENTAL HEALTH ASSOCIATION,  
PROJECT SHARE, AND THE NATIONAL MENTAL  
HEALTH CONSUMER SELF-HELP CLEARINGHOUSE  
AS AMICI CURIAE  
IN SUPPORT OF RESPONDENT**

**INTEREST OF AMICI CURIAE**

The interest of the *amici* is set forth in the accompanying motion for leave to file this brief.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

On December 7, 1981, respondent Darrell Burch was taken to Apalachee Community Mental Health Services, Inc. ("ACMHS") by a private citizen who had found him wandering along a highway. The *en banc* decision of the Eleventh Circuit summarized the medical records, stating that:

"Upon his arrival, Burch was hallucinating, confused, disoriented, and clearly psychotic, was wearing no shoes, and believed that he was in heaven." Pet. App. 4.

ACMHS had Burch sign a voluntary admission form and a form authorizing treatment. Complaint Ex. A-1, A-2.<sup>1</sup> Burch's condition was diagnosed as paranoid schizophrenia, and he was given psychotropic drugs. Pet. App. 5. Burch remained at ACMHS for three days, after which he was transferred to Florida State Hospital because ACMHS could not provide the treatment which was considered necessary. *Id.* Prior to his transfer, Burch signed forms requesting voluntary admission to Florida State Hospital and authorizing treatment. Complaint Ex. C-1, C-2.

Burch was taken to Florida State Hospital by a deputy sheriff. Upon Burch's arrival at the hospital on December 10, 1981, he signed a voluntary admission form. Complaint Ex. E-1. On December 23, 1981, Burch signed

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<sup>1</sup> We understand that the exhibits to the complaint are appended to respondent's brief.



a form authorizing treatment. Complaint Ex. E-5. Burch was described by the attending psychiatrist in a report dictated on December 29, 1981, as disoriented, semi-mute, confused and bizarre in appearance and thought. Complaint Ex. F-5.

Burch's complaint, filed after his release from Florida State Hospital on May 7, 1982, alleged in essence that employees at the hospital knew or should have known that he was incapable of giving voluntary and informed consent to his admission to and treatment by the hospital and that he was therefore denied his right to due process of law under the Fourteenth Amendment. Pet. App. 201.<sup>2</sup> The issue in this case is whether Burch's complaint states a cause of action under 42 U.S.C. § 1983. The district court held that it does not, relying on this Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), and on determinations that it would have been impracticable to provide a predeprivation hearing and that the State provided adequate postdeprivation remedies. Pet. App. 138-39. The court of appeals, sitting *en banc*, reversed the judgment of dismissal and remanded to the district court. 840 F.2d 797, Pet. App. 1. Eight of the thirteen judges found that the complaint states a cause of action under § 1983 for a denial of procedural due process, although they did not agree on the reasons for this conclusion.<sup>3</sup> In addition, seven judges found that the complaint did not state a cause of action for a denial of substantive due process.<sup>4</sup>

<sup>2</sup> Burch also sued ACMHS and the deputy sheriff, but these defendants have not petitioned for writ of certiorari. We understand that ACMHS has settled with Burch.

<sup>3</sup> There is no opinion of the court of appeals in this case. Four of the judges joined Judge Johnson's first opinion addressing procedural due process (Judges Vance, Kravitch, Hatchett, and Tuttle). Judge Clark filed a separate concurring opinion stating that he agreed with Judge Johnson's first opinion. Judges Anderson and Godbold filed a separate concurring opinion agreeing only with the result of Johnson's opinion on procedural due process.

<sup>4</sup> These seven were Judges Tjoflat, Roney, Hill, Fay, and Edmondson dissenting from the court's judgment, and Judges Anderson and

This Court granted certiorari on the following question:

"Whether the alleged 'willful, wanton and reckless' detention of a mentally disturbed person for purposes of treatment without a hearing states a claim for denial of procedural due process under 42 U.S.C. § 1983, where the due process deprivation was random, unforeseeable and contrary to state law, and where state law provides adequate postdeprivation remedies." Pet. Br. i.

This question is of course inaccurate, because the record does not establish that the due process deprivation at issue was "random" and "unforeseeable." To the contrary, a majority of the court of appeals concluded that the complaint alleged a deprivation that was not "random." In particular, Judge Johnson's plurality opinion held that the conduct in this case was not "random and unauthorized" under its interpretation of that term as it appears in *Parratt* and its progeny. The opinion defined such conduct as "conduct of a state actor who lacks the state-clothed authority to deprive persons of constitutionally protected interests." Pet. App. 17-18 n.9 (emphasis in original). Judges Clark, Anderson, and Godbold stated that the deprivation in this case was allegedly the product of an "established state procedure" or "institutionalized practice," and specifically held that such a deprivation was not random or unforeseeable under this Court's rulings in *Parratt*, *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Pet. App. 37-38, 48.<sup>5</sup>

Petitioners go so far in their brief as to assert that Burch "could not contend that Florida procedures them-

Godbold concurring specially. With respect to the other six judges, Judge Johnson's second opinion, concurred in by Judges Vance, Kravitch, Hatchett, and Tuttle, specifically found that Burch stated a substantive due process claim; Judge Clark did not reach this issue in his concurring opinion.

<sup>5</sup> The first Johnson opinion expressly did not reach the issue of whether the deprivation had occurred pursuant to an established state procedure. Pet. App. 25 n.11.

selves deprived him of his rights." Pet. Br. 37. Moreover, in their attempt to persuade this Court to reverse the judgment below, petitioners make far-reaching assertions and arguments about the due process rights of mentally ill persons committed to state facilities which, in the view of *amici*, are inaccurate. These assertions concern the adequacy of Florida statutory procedures, the degree of risk of erroneous deprivations of rights, whether a determination was ever made of Burch's ability to provide voluntary consent, and the probable effect of an affirmance by this Court upon state mental hospital procedures and conduct.

In Part I, *amici* demonstrate that Burch's commitment under voluntary admission procedures when he was incapable of voluntarily giving express and informed consent was very likely the result of an established state procedure of allowing almost any potential patient who is physically capable of signing the papers to admit himself voluntarily. This conclusion is supported by a combination of circumstances, including the procedural scheme of the Florida statute, which creates incentives and opportunities for the abuse of voluntary commitment procedures, and the statutory and institutional preference for voluntary admissions. *Amici* also demonstrate that institutional abuse of voluntary commitment procedures is likely by describing a number of studies of mental hospital practices in other states, which show that "voluntary" patients often have no real understanding of the forms they have signed or the procedures to which they have purportedly consented. Finally, the number of defendants and the duration of the alleged misconduct in this case are inconsistent with characterizing that misconduct as "random."

In Part II, *amici* contend that due process at least requires that a formal threshold determination be made of a prospective patient's ability to provide voluntary and informed consent to "voluntary commitment" by a qualified mental health professional after an adequate examination of the patient. Such a minimum requirement

would greatly reduce the high risk of erroneous deprivations of substantial rights currently present under the Florida statute and would not place an undue burden on the State or discourage individuals who are able to provide voluntary consent to admission and treatment from doing so.

### ARGUMENT

#### **I. THE COMMITMENT OF BURCH UNDER VOLUNTARY ADMISSION PROCEDURES WHEN HE WAS INCAPABLE OF VOLUNTARILY GIVING EXPRESS AND INFORMED CONSENT WAS VERY LIKELY NOT A RANDOM ACT, BUT RATHER THE RESULT OF AN ESTABLISHED STATE PROCEDURE.**

Petitioners committed Burch to a state mental hospital by permitting him to sign voluntary admission and treatment forms. Petitioners have conceded that the complaint alleges that Burch was not able to give the voluntary and informed consent necessary to permit a legal voluntary admission. Pet. Br. 16. Nevertheless, they assert that Burch has not stated a cause of action under § 1983 because Burch's improper confinement was the result of random and unexpected conduct. *E.g.*, Pet. Br. 35. That assertion, however, has not been established in this case and is unlikely under the circumstances.

Petitioners continually characterize this case as one involving a random misjudgment of Burch's competency and emphasize that determinations of voluntariness are fraught with uncertainty. Pet. Br. 14-15, 17-21, 24. There is, however, absolutely nothing in the record that demonstrates that any determination that Burch was competent or able to give voluntary consent ever took place.<sup>6</sup> Thus, this action does not simply challenge a mis-

<sup>6</sup> Although one of the exhibits attached to Burch's complaint, a "ward staff admission note," has handwritten check-marks in the preprinted portion of the form by the words "voluntary" and "competent," this does not reflect that an actual determination of Burch's competency was made. Complaint Ex. F-6. This form is apparently completed by a ward clerk using the patient's admission



taken judgment of competency made by a qualified mental health professional. It is much more likely that Burch's improper confinement was the result of a number of circumstances which have fostered an institutionalized practice of allowing almost any patient who will sign consent forms to do so, despite the fact that the patient may be clearly incompetent or otherwise unable to give express and informed consent.

**A. The Procedural Scheme of the Florida Act Creates Incentives and Opportunities for the Abuse of Voluntary Commitment Procedures.**

A patient can be admitted to a mental facility in Florida under four different provisions of the Florida Mental Health Act, Chapter 394, Part I, Florida Statutes (1981) ("the Act")—"emergency admission," admission for a "court-ordered evaluation," "involuntary placement," or "voluntary admission." All four provisions allow a mental health facility to detain and provide treatment to a nonconsenting mental patient for at least a short period of time. As we explain below, the statutory scheme of the Act creates incentives for hospitals to neglect the requirement that consent to "voluntary admission" and the attendant waiver of significant rights be truly knowing and voluntary.

**1. Emergency Admission**

An individual may be admitted involuntarily on an emergency basis if there is reason to believe that he is mentally ill and that because of his mental illness he is either likely to injure himself or others if allowed to remain at liberty, or if he is in need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf, in which case an *ex parte* order must be obtained authorizing the admission. § 394.463 (1) (a), Pet. Br. A-20. An emergency admission may be

papers and, for all the record shows, competency was assumed from the fact of Burch's voluntary admission. Indeed, the "competent/incompetent" boxes on the form may simply refer to whether there has been an adjudication of incompetency.

initiated by: a judge in an *ex parte* proceeding; a law enforcement officer who takes a person appearing to meet the criteria into custody and delivers him to the nearest receiving facility; or a mental health professional who certifies that he has examined a person within the last 48 hours and finds that the person appears to meet the criteria for emergency admission (in which case the certificate authorizes a law enforcement officer to take the person into custody). § 394.463(1) (b), Pet. Br. A-20 to A-21. In the latter two circumstances, the law enforcement officer must complete a written report detailing the circumstances under which the patient was taken into custody.

A person admitted on an emergency basis may be examined and treated by the receiving facility without unreasonable delay. § 394.463(1) (c), Pet. Br. A-21. The patient must be discharged after 48 hours unless the examining professional concludes that there is reason to believe that the patient may require evaluation or treatment, in which case the patient must be voluntarily admitted or a proceeding for a court-ordered evaluation or involuntary placement must be initiated. § 394.463(1) (d), Pet. Br. A-21 to A-22. If a proceeding is initiated for a court-ordered evaluation or involuntary commitment, the patient may be held for up to an additional five days before the hearing must take place. § 394.463 (2) (c), Pet. Br. A-23; § 394.467(2), Pet. Br. A-29.

**2. Court-Ordered Evaluation**

An individual may be held by a facility for up to five days under a court order for evaluation if there is reason to believe that he is mentally ill and because of his illness he is likely to injure himself or others if allowed to remain at liberty, or that he is in need of care or treatment which, if not provided, may result in neglect or refusal to care for himself to such an extent that it poses a real and present threat of substantial harm to his well-being. § 394.463(2) (a), Pet. Br. A-22. Proceedings for a court-ordered evaluation may be initiated by any per-



son who files with a court a petition requesting an evaluation of an individual who is alleged to meet the statutory criteria. § 394.463(2)(b), Pet. Br. A-22.<sup>7</sup>

A hearing on the petition must be held within five days and notice of the hearing must be served on the patient or his guardian or representatives. The patient has a right to counsel at this hearing. § 394.463(2)(c), Pet. Br. A-23 to A-24. The judge, after making the appropriate findings, may have the patient taken by a law enforcement officer to a receiving facility or order the patient to appear at a receiving facility for evaluation at a specified time. § 394.463(2)(d), Pet. Br. A-24. A patient admitted to a receiving facility for evaluation may be detained for no more than five days unless he consents to voluntary placement, or proceedings for the involuntary commitment are initiated. A patient held under a court order for evaluation may be given the "least restrictive form of treatment" if a mental health professional determines that such treatment is "necessary." § 394.463(2)(e), Pet. Br. A-24 to A-25.

### 3. *Involuntary Placement*

An individual may be involuntarily committed to a mental facility for any period up to six months if he is mentally ill and if because of his mental illness, he is likely to injure himself or others if allowed to remain at liberty, or if, again because of his mental illness, he is in need of care or treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being. The Act provides significant rights to the potential involuntary patient.

A patient may be involuntarily committed to a treatment facility only upon recommendation of the adminis-

<sup>7</sup> The petition must be supported by either the affidavits of two additional persons or the certificate of a mental health professional stating that he has examined the patient in the last five days and has found that the person is mentally ill and requires placement for full evaluation. § 394.463(2)(b), Pet. Br. A-22.

trator of a receiving facility. The administrator's recommendation must be supported by the opinions of two mental health professionals, at least one of whom must be a physician, who have personally examined the patient within the preceding five days.<sup>8</sup> An involuntary placement certificate must be served on the patient and his guardian or representative along with the following: written notice, "in plain and simple language," that the patient (or his guardian or representative) may apply at any time for a hearing if he had previously waived such a hearing; a petition for a hearing, which requires only the signature of the patient (or his guardian or representative) for completion; written notice pertaining to the filing of the petition; and written notice that the patient may apply immediately to the court to have an attorney appointed. § 394.467(1)(b) & (2), Pet. Br. A-28 to A-30.

The judge must serve notice of the involuntary commitment hearing on the administrator of the facility, the state attorney, and the patient. The patient and his guardian or representative must be informed of the patient's right to counsel and his right to an independent expert examination by a mental health professional. Each will be provided for the patient free of charge if the patient is indigent. The patient's counsel must be provided access to the facility's records and to facility personnel. A hearing must be held within five days of the notice of hearing and one of the mental health professionals who executed the involuntary placement certificate must be a witness at the hearing. If the court concludes that the patient meets the criteria for involuntary commitment, the judge will order the patient to be transferred to a treatment facility or retained at the facility if the patient is already there. § 394.467(3)(a), Pet. Br. A-30 to A-31.

<sup>8</sup> The recommendation is entered on an involuntary placement certificate, which authorizes a receiving facility to retain the patient pending transfer or completion of a hearing. § 394.467(2), Pet. Br. A-29.

Florida law requires that prior to ordering involuntary commitment, the judge must consider less restrictive alternatives to confinement in a mental institution. *In re Beverly*, 342 So. 2d 481 (Fla. 1977); *Williams v. Wilson*, 424 So. 2d 159 (Fla. Dist. Ct. App. 1982). Therefore, it is possible that an individual may meet the statutory criteria for involuntary placement, but still may not be committed if treatment could be provided in a less restrictive manner.

At an involuntary commitment hearing, the judge must also consider evidence of the patient's competence to consent to treatment. If the judge finds that the patient is incompetent to consent to treatment, he must appoint a guardian advocate who will act on the patient's behalf relating to express and informed consent to treatment. § 394.467(3)(a), Pet. Br. A-31.<sup>9</sup>

A mental health facility may confine a patient admitted involuntarily for no longer than six months. *Id.* If the facility wishes to retain the patient thereafter, the administrator must apply to a hearing officer for an order authorizing continued involuntary placement.<sup>10</sup> The administrator's request must be accompanied by a statement from the patient's mental health professional justifying the request and a brief summary of the patient's treatment during the time of his involuntary commitment. The administrator must also submit an individualized treatment plan for the patient. § 394.467(4)(a), Pet. Br. A-32.

#### 4. Voluntary Admission

Voluntary admission procedures provide a sharp contrast to involuntary placement procedures and, indeed,

<sup>9</sup> The judge may also adjudicate a person incompetent during a hearing on involuntary commitment, in which case a guardian must be appointed for the patient. § 394.467(3)(a), Pet. Br. A-31.

<sup>10</sup> The involuntary patient has a right of counsel in this proceeding, and the patient and his guardian or representatives are provided with the same notice and disclosures as are required in the initial hearing. § 394.467(4)(a), Pet. Br. A-32.

to emergency admissions. The Act authorizes facilities to receive for observation, diagnosis, or treatment any individual 18 years of age or older who provides "express and informed consent" to admission. If the individual is found to "show evidence of mental illness" and to be "suitable for treatment" the individual may be admitted. § 394.465(1)(a), Pet. Br. A-25. The Act defines "express and informed consent" as "consent voluntarily given in writing after sufficient explanation and disclosure of the subject matter involved to enable the person whose consent is sought to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion." § 394.455(22), Pet. Br. A-5 to A-6.

The Act, however, provides absolutely no safeguards for ensuring that this standard is satisfied. The Act does not specify which staff members at a facility are permitted to make the determination that an individual shows "evidence of mental illness" and is "suitable for treatment." In addition, the Act does not require that any determination be made pertaining to whether an individual is able to provide "express and informed consent."<sup>11</sup> If any such determination is made, it most likely would be made by the admissions clerk handling the paperwork and apparently could be made by any employee at the facility.<sup>12</sup>

Once an individual has been admitted to a facility under voluntary procedures, his status is no longer truly voluntary. While a voluntary patient (or his guardian, representative, or attorney) may make a written request

<sup>11</sup> The Act provides that an individual under 18 years of age must be given an administrative hearing to verify the voluntariness of his consent before he may be permitted to voluntarily admit himself to a mental health facility. § 394.465(1)(b), Pet. Br. A-26. There is no comparable requirement for adults.

<sup>12</sup> For example, Burch's form requesting voluntary admission to Florida State Hospital was witnessed by an Accredited Records Technician and another individual who apparently also was not a mental health professional. Complaint Ex. E-1.



for discharge at any time, the facility may detain the patient for at least three days.<sup>13</sup> If the administrator determines that the patient meets the criteria for involuntary placement, proceedings for involuntary placement must be initiated within the three-day period. In that case, a determination of whether involuntary placement is appropriate may not be made for an additional five days, during which time the patient is not released. § 394.465 (2) (a), Pet. Br. A-26.<sup>14</sup>

All patients, voluntary or involuntary, have a right to representatives, who must be designated at the time of admission, and who must be served with written notice of the patient's hospitalization within 24 hours of the patient's admission. § 394.459(12) (a), Pet. Br. A-17.<sup>15</sup> The Act also provides that at the time of admission and every six months thereafter, a voluntary patient and his guardian or representatives must be notified in writing of the patient's right to apply for discharge. § 394.465(3), Pet. Br. A-27.<sup>16</sup>

<sup>13</sup> This three-day period is determined exclusive of weekends or legal holidays. In addition, if the patient makes an oral request for discharge, the patient must be given "counseling and assistance in preparing a written request" within eight hours. When a staff member receives a written request for discharge, he must deliver it to the administrator within sixteen hours. § 394.465(2) (a), Pet. Br. A-26. Thus, it appears that four weekdays of continued commitment may follow an oral request for discharge.

<sup>14</sup> In an extreme case, a patient makes an oral request for discharge on a Thursday morning, and it takes one day to provide him with assistance in writing his request and delivering the request to the administrator. The administrator initiates involuntary placement proceedings the following Wednesday, and the patient does not receive a hearing until the following Wednesday. If the patient wins release at the hearing, he still has been held for thirteen days against his will.

<sup>15</sup> Petitioners make much of the fact that the exhibits to the complaint contain such a notice form. Pet. Br. 11 n.7, 25. This form, however, does not indicate the identity of the representative or if the form was ever sent. Complaint Ex. E-4.

<sup>16</sup> Petitioners assert that this notice requirement provides significant protection to voluntary patients. Pet. Br. 24. It is logical to

### 5. Consent to Treatment Provisions

A patient who signs voluntary admission forms, whether or not he has the capacity to do so, is also likely to consent to treatment. All patients in Florida mental facilities must be requested to give express and informed consent to treatment. This consent can be given only after disclosure—to the patient if he is competent or to his guardian if he is a minor or incompetent—of the purpose of the treatment to be provided, the common side effects, any alternative treatment, the approximate length of care, and that any consent given by a patient may be revoked at any time by the patient or his guardian. § 394.459(3) (a), Pet. Br. A-11. There is no statutory requirement, however, that the capacity of a voluntary patient to consent to treatment be determined by any particular individual.

If a voluntary patient refuses to consent or revokes his consent to treatment, the patient must either be discharged within three days or proceedings for involuntary commitment must be initiated within three days. In addition, if any patient refuses or revokes consent to treatment and if, in the opinion of the patient's mental health professional, the treatment is "essential to appropriate care for such patient," the administrator must immediately petition for a hearing before a hearing examiner to determine the competency of the patient to consent to treatment.<sup>17</sup> *Id.* A-11 to A-12.

assume, however, that a patient who is unable to give express and informed consent may not be able to comprehend written notice of his rights. See Part I.C., *infra*.

<sup>17</sup> The Act provides that if the patient is found to be incompetent to consent to treatment, a guardian advocate will be appointed to act on the patient's behalf relating to the provision of express and informed consent to treatment. § 394.459(3) (a), Pet. Br. A-12. In *Bentley v. State ex rel. Rogers*, 398 So. 2d 992 (Fla. Dist. Ct. App. 1981), however, the court held that the Florida Constitution required that the determination of a patient's competency to consent to treatment under § 394.467(4) and § 394.459(3) be made by a court, not a hearing examiner.



Thus, while the Act provides for a hearing before a hearing examiner if the patient *refuses* consent to treatment, there is no procedure for determining whether the patient is competent to consent to treatment before he is asked to sign the requisite papers. The determination of the patient's ability to consent to treatment apparently could be left in the hands of the staff member handling the paperwork. Accordingly, a patient has a statutory right to a determination regarding his competency to consent to treatment only if he is being involuntarily committed, if the hospital is seeking to continue his involuntary commitment, or if he refuses or revokes consent to treatment.

#### 6. Comparison of Procedures

Patients admitted to a facility on an emergency or involuntary basis are entitled to a number of rights and procedural safeguards not provided to patients admitted on a voluntary basis. An emergency admission requires the execution of some kind of document: an *ex parte* order by a judge, a fairly extensive report by a law enforcement officer, or a certificate by a mental health professional based on an examination of the patient. The patient admitted on an emergency basis thus receives at least a small amount of administrative process immediately; at least some findings must be made in writing at the time of admission.

In the case of a voluntary admission, however, the only document necessary for admission is a simple consent form signed by the patient. Moreover, admission of a voluntary patient is based only on a finding that the patient shows "evidence of mental illness" and is "suitable for treatment." This finding is not required to be made in writing and can apparently be made by an individual who is not a mental health professional. While a voluntary patient appears to be entitled to some disclosure under the requirement of "express and informed consent" prior to consenting to admission, the type and amount of disclosure necessary is not specified and thus apparently

left to the discretion of the staff members of the mental facility.

To initiate involuntary commitment, the administrator of a facility must file a recommendation, which must be supported by the opinions of two mental health professionals who have personally examined the patient. This recommendation must be made in writing on an involuntary placement certificate. In contrast, a voluntary patient may be admitted without ever having been seen by a mental health professional. Moreover, the involuntary patient (and his guardian or representative) must be served with an involuntary commitment certificate, a petition for a hearing, written notice of his right to a hearing if he had waived a hearing, and written notice of his right to have counsel appointed. At the time that the judge serves notice of the hearing, the patient must again be informed of his right to counsel, as well as his right to an independent expert examination by a mental health professional. The only notice received by a voluntary patient is notice of his right to request discharge, which he must receive every six months.

An involuntary patient must receive a formal evaluation six months after admission in order to continue his commitment. This evaluation requires that the patient's mental health professional justify the request for continued commitment, provide a summary of the patient's treatment, and submit an individualized treatment plan for the patient. In contrast, a voluntary patient may be held indefinitely without any formal evaluation of the patient's treatment or progress and without any specified plan for treatment.

A patient who is unable to give consent to admission, but is permitted to do so, is denied the right to have a judge consider less restrictive alternatives to confinement in a hospital. The voluntary patient who is incompetent to consent to treatment is also denied the significant protection of having a guardian advocate appointed to serve as a disinterested party in making treatment decisions.

Thus, the procedural requirements of the Act provide the administration and staff of a mental facility with substantial opportunities and incentives to allow patients who are incapable of furnishing the necessary consent to sign voluntary admission forms. As discussed below in Part I.C, from the perspective of the facility's staff, voluntary admissions save time and avoid what is perceived as inconvenient paperwork.

Furthermore, the Act provides no barriers to the abuse of voluntary admission procedures. There is no express requirement that a mental health professional make a determination of a voluntary patient's ability to provide the necessary voluntary informed consent either prior to or within a short time after admission. This lack, combined with the incentives for avoiding the paperwork and procedures necessary for an emergency admission or involuntary commitment, means that the clerk who may be left to make the determination of whether a patient should be admitted under voluntary procedures may well admit anyone who can be persuaded to sign the form.

#### **B. Voluntary Commitment Is Actively Encouraged in Florida.**

Petitioners do not dispute that commitment under voluntary procedures is actively encouraged in Florida or that the Act encourages voluntary admissions. Pet. Br. 25. Indeed, the preference for voluntary procedures is reflected in the language of the Act itself. Nevertheless, while the Act's encouragement of voluntary commitment is explicitly stated, its limitations are vague and discretionary.

The section of the Act providing for court-ordered evaluation of patients states that "[t]he staff members of all receiving facilities shall encourage patients to apply for voluntary placement if placement appears to be necessary." § 394.463(2)(e), Pet. Br. A-24. This provision is not accompanied by any limitation whatsoever.

The Act also contains a provision permitting a patient to transfer his status from involuntary to voluntary which provides:

"Staff members of all treatment facilities shall encourage an involuntary patient to give express and informed consent to transfer to voluntary status unless the patient is under criminal charges, or unless the patient is unable to understand the nature of voluntary placement, or unless voluntary placement would be harmful to the patient, in which case a finding to this effect shall be entered in the patient's clinical record. Any involuntary patient who applies shall be transferred immediately, unless such transfer would not be in the best interest of the patient, in which case such finding shall be entered in the patient's clinical record and shall be subject to review every 90 days." § 394.465(4), Pet. Br. A-27 (emphasis added).

Thus, transfer from involuntary to voluntary status is intended to be a simple matter. This section directs staff members of mental facilities to persuade patients to waive the significant rights to which they are entitled as involuntarily committed patients, apparently without any kind of disclosure. While there are provisions stating that the staff should not encourage the transfer if the patient is "unable to understand the nature of voluntary placement" and that transfer should not be granted if it would not be "in the best interest of the patient," there is no requirement that anyone at the facility make a finding that the patient is able to consent to voluntary commitment.<sup>18</sup> Furthermore, the required findings are left solely to the discretion of the staff. Thus, the Act expressly encourages voluntary over involuntary commitment with inadequate safeguards.

#### **C. A Number of Studies in Other States Demonstrate That Voluntary Admission Procedures Are Routinely Abused.**

Researchers who have studied the ability of "voluntary" patients to consent to their commitment have concluded

<sup>18</sup> In addition, the Act provides that the administrator shall not transfer any patient to voluntary status when he has reason to believe that the patient is dangerous to himself or others. § 394.467(4)(d), Pet. Br. A-33.



that a substantial number of patients admitted under voluntary procedures do not comprehend their rights as mental patients and are in fact incapable of providing voluntary or informed consent to admission. These studies also contradict the common assumption that voluntary admissions are always based on individual decisions to seek mental treatment. One commentator has stated that, without an initial assessment of a patient's ability to voluntarily consent, the patient's status is determined only on the basis of whether the patient is hostile or compliant. Owens, *When is a Voluntary Commitment Really Voluntary?*, 47 Am. J. Orthopsych. 104, 107 (1977).<sup>19</sup> The standard for voluntary admission then becomes "anyone who will agree to sign."<sup>20</sup> *Id.* 108.

A study of voluntary admissions in Illinois found that approximately 40% of all voluntarily admitted patients were brought to the mental facility by a law enforcement officer and that in 55% of the cases in which a law enforcement officer brought an individual to the hospital, that individual was admitted voluntarily. Gilboy & Schmidt, "Voluntary" Hospitalization of the Mentally Ill, 66 Nw. U.L. Rev. 429, 433 (1971).<sup>21</sup> Specifically, it found that individuals were routinely persuaded to voluntarily commit themselves without concern for the adequacy of disclosure given to the patient and without concern for the voluntariness of the consent. *Id.* 430.

<sup>19</sup> Such an initial assessment is "a necessary step" in deciding whether a patient may be admitted voluntarily which "must be made before the patient is offered forms to sign." Owens, *supra*, at 107 (emphasis in original).

<sup>20</sup> It is "quite possible for a psychotic person to be able to write his name on a paper when it is suggested to him to do so, without any concept that such an action is logically connected with 'illness' or his own state of mind, his behavior, or his need for hospitalization." Owens, *supra*, at 107.

<sup>21</sup> See also Legemaate, *Legal Aspects of Voluntary Psychiatric Hospitalization*, 11 Inter. J. Law & Psych. 259, 261 (1988); Szasz, *Voluntary Mental Hospitalization: An Unacknowledged Practice of Medical Fraud*, 287 New Eng. J. Med. 277 (1972).

The study further documents the institutionalized abuse of voluntary admission procedures based on the desire to save time and paperwork. The researchers found that lack of time and personnel at facilities created "strong pressure to screen patients quickly and move on to the task of getting their admission paperwork out of the way." *Id.* 436. The study concluded that at these facilities "the effort was to get the individual to sign himself in so that responsibility could be avoided, the screening process and paperwork could be simplified and the admissions officer could move on to the next case." *Id.* 443. In addition, the value of voluntary admission procedures to hospital officials was described as "hospitalizing individuals with a minimum of official responsibility and difficulty." *Id.* 432.

The Illinois study also noted that in some instances doctors at the facilities urged patients to voluntarily admit themselves in order to avoid having to take the responsibility of signing the certificate necessary for an involuntary admission. The study documented that involuntary commitment with all its attendant rights was viewed by hospital officials as "merely an additional complication." *Id.* 453.

Another study concluded that a large percentage of patients who were voluntarily admitted to a Massachusetts mental health facility were not capable of giving voluntary and informed consent to their own admission. Appelbaum, Mirkin & Bateman, *Empirical Assessment of Competency to Consent to Psychiatric Hospitalization*, 138 Am. J. Psych. 1170, 1174 (1981).<sup>22</sup> The study involved interviews of patients voluntarily admitted to the facility approximately 24 to 48 hours after admission.<sup>23</sup>

<sup>22</sup> This study was conducted at the Massachusetts Mental Health Center, a state-operated community mental health center and teaching hospital for Harvard Medical School.

<sup>23</sup> An identical follow-up interview conducted a week after admission showed no significant change in response overall. Appelbaum, Mirkin & Bateman, *supra*, at 1173.



Each patient was asked questions designed to assess seven factors related to the patient's capacity to provide consent to admission.<sup>24</sup> *Id.* 1171.

The study analyzed the results of the interviews using four possible criteria for definitions of competency which included some or all of the seven factors. Under each of the definitions of competency, a large percentage and possibly a majority of the patients were found to be unable to provide adequate consent to their own admission.<sup>25</sup> Specifically, it was found that 50% of the voluntary patients did not at that time acknowledge their need to be in a psychiatric hospital. In addition, despite the fact that the relevant information had been given to each patient in written form at the time of admission, only 16% of the patients were able to adequately describe the procedure for obtaining release from the hospital, only 36% of the patients knew that there was someone at the hospital with whom they could discuss their rights, and fewer than half of the patients knew that they had the right to refuse medication. *Id.* 1173-74.

A similar study of voluntary mental patients in Massachusetts explored those patients' understanding of the terms of their admission through interviews and found a "massive lack of comprehension" by patients of their voluntary status and the terms of their admission.

<sup>24</sup> These factors were characterized as the patient's: (1) appreciation of the nature of his condition; (2) awareness of the nature of hospitalization; (3) comprehension of the reason admission was recommended; (4) ability to decide to cooperate with a treatment plan; (5) ability to protect himself in the hospital environment; (6) awareness of rights as outlined in written material received at the time of admission; and (7) awareness of possible adverse consequences of admission. Appelbaum, Mirkin & Bateman, *supra*, at 1171.

<sup>25</sup> In addition, 12% of the patients admitted voluntarily refused to participate in this study, almost half of whom were described as "grossly psychotic." An additional nine percent of the patients were mute or catatonic when approached. These individuals were not included in the study. Appelbaum, Mirkin & Bateman, *supra*, at 1172.

Olin & Olin, *Informed Consent in Voluntary Mental Hospital Admissions*, 132 Am. J. Psych. 938, 940 (1975).<sup>26</sup> Immediately after admission, 55% of the patients interviewed either gave erroneous answers or were unable to provide any answer to questions pertaining to obtaining release from the facility and other terms of voluntary admission. *Id.* 939.

The empirical research in this area demonstrates that contrary to petitioners' assertions, the risk of error inherent in Florida's voluntary admission procedures is extremely high. The documentation of the abuse or failure of voluntary placement procedures in states with similar statutory schemes substantially undermines petitioners' unsupported assertion that Burch's rights were not deprived pursuant to an established state procedure.

#### D. The Number of Defendants and the Duration of the Alleged Misconduct Are Inconsistent With "Random" Action.

The complaint names eleven defendants from the Florida Hospital, two of whom were the administrator of the facility and Burch's attending physician, the only state employees who could have initiated involuntary placement proceedings. Moreover, the alleged misconduct of these individuals continued over the five-month period that Burch was confined. It is difficult to comprehend how alleged misconduct by eleven individuals over such a time

<sup>26</sup> It should be noted that 42% of the patients were responsive to the questions, but did not know the correct answers. Olin & Olin, *supra*, at 939. This suggests that the patients were capable of understanding the information, but that it had not been adequately explained. Another particularly disturbing study conducted at an Ohio public mental hospital found that 24 of the 40 voluntary patients questioned between one and ten days after admission (all of whom had never been admitted to a mental hospital previously) could not remember having signed the voluntary admission form and two others denied that they had done so. Palmer & Wohl, *Voluntary Admission Forms: Does the Patient Know What He's Signing?*, 23 Hosp. & Comm. Psych. 250, 252 (1972). In addition, none of the remaining 14 patients was able to describe adequately the content of the form. *Id.*

period could be characterized as "random" within the meaning of *Parratt* and *Hudson*.

## II. DUE PROCESS AT LEAST REQUIRES THAT A QUALIFIED MENTAL HEALTH PROFESSIONAL MAKE A FORMAL THRESHOLD DETERMINATION OF THE VOLUNTARY AND INFORMED NATURE OF A PATIENT'S CONSENT TO VOLUNTARY ADMISSION AND TREATMENT.

Apart from the fact that the alleged conduct in this case was very likely not "random and unauthorized," the process provided to voluntary mental patients by statute is not constitutionally sufficient. Petitioners argue that Florida's postdeprivation procedures are adequate to provide due process. Pet. Br. 25. *Amici* disagree. Moreover, a requirement of "express and informed consent," without any procedure to ensure that this requirement is met, is also insufficient to provide due process to "voluntary" patients.

Petitioners assume that a mental health professional made some evaluation of Burch's ability to provide the express and informed consent necessary for voluntary commitment. Pet. Br. 18-19. This assumption is unwarranted. The Act does not require that such an evaluation take place; it does not even require that an individual be seen by a mental health professional prior to voluntary admission. Furthermore, the record is at best unclear on this point; it does not demonstrate that such an evaluation or determination ever took place.<sup>27</sup>

*Amici* concur with petitioners' position that in order to identify the requirements of due process, the various interests involved must be weighed and balanced in accordance with this Court's ruling in *Mathews v. Eldridge*, 424 U.S. 319 (1976). We discuss below the factors set out in that decision.<sup>28</sup> This analysis demonstrates that

<sup>27</sup> Burch's admission form was not even witnessed by a mental health professional. See note 12, *supra*.

<sup>28</sup> *Mathews* stated that due process is flexible and requires only such protections as the particular situation demands. 424 U.S. at

due process at least requires that a formal threshold determination of a patient's ability to provide voluntary informed consent to admission be made by a qualified mental health professional after an adequate examination of the patient.<sup>29</sup>

### A. The Interests of the Individual

The interests of the individual in this case include his liberty interest in not being confined in a mental institution, his liberty interest in not being forced to take potentially dangerous psychotropic drugs,<sup>30</sup> and his interest in receiving substantial procedural rights under the involuntary commitment procedures.<sup>31</sup> Petitioners' efforts

334, citing *Morrissey v. Brewer*, 408 U.S. 471 (1972). In order to determine what procedures were constitutionally required, the Court in *Mathews* considered the private interest of the individual affected by the official action, the risk of an erroneous deprivation of the individual's interest though the procedures used and the probable value of additional procedural safeguards, and the government's interest (including the function involved and the administrative burdens created by the requirement of additional procedural safeguards). *Id.* 335.

<sup>29</sup> The term "mental health professional" was defined in the Act to include psychiatrists and psychologists with specified training and experience and, if such individuals were not available, any physician "who diagnosed and treated mental and nervous disorders." § 394.455(2), Pet. Br. A-2. In 1982, the Act was amended and this term was replaced throughout by the term "physician or clinical psychologist." Fla. Stat. § 394.455(2) (1985).

<sup>30</sup> The dangerous side effects common to psychotropic drugs has been thoroughly documented and the patient's significant interest in not being treated with these drugs against his will has been recognized. See, e.g., *Rogers v. Commissioner of Dept. of Mental Health*, 458 N.E.2d 308, 316-19 (Mass. 1983); *Guardianship of Roe*, 421 N.E.2d 40, 51-54 (Mass. 1981).

<sup>31</sup> Petitioners also argue that the individual's liberty interest must be weighed against his interest in "prompt treatment," relying on the assertion that a hearing "inevitably means delay in treatment." Pet. Br. 22. This statement ignores the fact that the Act explicitly allows a facility to treat patients pending a hearing. § 394.463(1)(c), Pet. Br. A-21; § 394.459(3)(a), Pet. Br. A-11 to A-12. Moreover, while petitioners imply that an involuntary com-



to downplay Burch's deprivation of liberty disregard this Court's holding that commitment to a mental institution constitutes a substantial and significant deprivation of liberty. *Vitek v. Jones*, 445 U.S. 480, 491 (1980); *Addington v. Texas*, 441 U.S. 418, 425 (1979). This deprivation of liberty, however, is the primary individual interest affected by the State's action in this case.

Moreover, Burch was permitted to waive the substantial rights that the Act provides to involuntary mental patients—including the right to counsel (without charge if the individual is indigent), the right to an independent psychiatric evaluation (also without charge if the individual is indigent), the right to a guardian advocate if he had been found to be incompetent to consent to treatment, and the right to have less restrictive treatment considered—without any determination of his ability to do so by an individual qualified to make that determination.<sup>32</sup> The State must ensure that the waiver of these rights by an apparently mentally ill individual is knowing and intelligent.<sup>33</sup>

In assessing the interests of the individual in this case, a central assumption by petitioners should be corrected. Petitioners assume that because Burch was incapable of giving voluntary informed consent to admission, he would

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mitment hearing is somehow harmful to mental patients (Pet. Br. 22-23), at least one study concludes that the involuntary commitment process may in fact provide therapeutic benefits to the patient involved. Ensminger & Liguori, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, 6 J. Psych. & Law 5 (1978).

<sup>32</sup> See Part I.A. 3, *supra*.

<sup>33</sup> Similarly, a guilty plea may not be accepted by a court without an affirmative showing that it is an intelligent and voluntary waiver of the defendant's constitutional rights. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). *Amici* do not argue that a judge must rule on the voluntary and informed nature of a patient's consent to admission, but only that there be some meaningful determination that a potential mental patient is knowingly and voluntarily waiving his liberty and procedural rights before allowing him to do so.

have been involuntarily committed if he had been furnished with a hearing. First, this assumption begs the question, because Burch was entitled to the relevant procedural protections regardless of the ultimate outcome regarding his commitment. Moreover, the assumption is unwarranted. Florida's procedures would have required a showing that Burch was a danger to himself or others or was unable to care for himself to such an extent that there was immediate danger to his well-being before he could be involuntarily committed. § 394.467(1)(b), Pet. Br. A-28. It is not entirely clear from the record that such a showing could have been made.

Furthermore, even if Burch had met the criteria for involuntary placement, under Florida law the court would have been obligated to consider less restrictive means of treatment. *In re Beverly, supra*. It is not inconceivable or contrary to the allegations of the complaint that Burch could have been treated on an outpatient basis. Finally, petitioners go so far as to suggest that Burch's need for treatment alone would have justified his commitment. Pet. Br. 16. Not only does this view directly conflict with Florida's involuntary commitment criteria, it has never been adopted by this Court.

#### B. The Interests of the State

There is no doubt that the State has significant interests in providing treatment to the mentally ill and in not imposing unnecessary procedural obstacles that might have the effect of discouraging the mentally ill from seeking treatment. *Parham v. J.R.*, 442 U.S. 584, 605 (1979).<sup>34</sup> Due process, however, may be provided without creating such obstacles. Moreover, the State has no interest in the "voluntary" commitment of individuals unable

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<sup>34</sup> *Amici* agree that there are legitimate rationales for encouraging competent individuals to seek treatment on a voluntary basis. See, e.g., S. Brakel, J. Parry & B. Weiner, *The Mentally Disabled and the Law* 178 (1985); E. Beis, *Mental Health and the Law* 112 (1984).



to provide truly voluntary and informed consent to their admission.

Petitioners argue that if Burch is permitted to bring his action in federal court, the State would be forced to provide a hearing to all patients who seek voluntary admission; petitioners therefore characterize the State's interest as not having to provide an involuntary commitment hearing for every patient. Pet. Br. 23, 25. This assertion is incorrect. *Amici* contend only that due process requires at least that a threshold determination be made by a qualified mental health professional of the voluntary and informed nature of an individual's consent to admission. This threshold determination need not involve a hearing. Only if the professional questions whether the prospective patient is capable of providing voluntary and informed consent to admission will an involuntary placement proceeding or a competency hearing before a judge be necessary. Where the professional has no question about the patient's capacity to consent, voluntary admission will remain the preferred method of hospitalization.<sup>35</sup>

This process will not unduly expose the mental health professional to personal liability. After the mental health professional determines that an individual is capable of providing the requisite consent to admission, the professional will have the defense of qualified immunity in appropriate circumstances, should that determination ever be challenged. *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975).<sup>36</sup> In addition, despite petitioners' statements to

<sup>35</sup> In many cases, particularly when the patient presents himself for treatment, the mental health professional will have no reason to doubt the voluntariness of the consent. When the mental health professional has sufficient doubt to refuse to admit a patient "voluntarily," the extra costs of alternative commitment procedures result from the State's own policy that individuals who are incapable of making admission decisions must be admitted through emergency admission procedures, involuntary placement proceedings, or consent by a duly-appointed guardian.

<sup>36</sup> Since no determination that Burch was able to provide voluntary and informed consent seems to have been made by a qualified

the contrary (Pet. Br. 23), there is little likelihood that a potential voluntary patient would forego treatment if such a determination is required.

Thus, petitioners' characterization of the burden on the State in these circumstances is overstated. Providing potential voluntary patients with due process would not require excessive expenditures of monetary or human resources.<sup>37</sup>

### C. The Risk of Erroneous Deprivation and the Value of Additional Procedural Safeguards

As discussed above in Part I.C, the risk of an erroneous deprivation of rights under Florida's existing statutory procedures is high. By requiring a formal threshold determination of a potential voluntary patient's ability to provide the necessary consent, the opportunity to abuse the voluntary admissions procedures and the corresponding risk of commitment on the basis of an invalid consent will be considerably lessened.

By contrast, Florida's postdeprivation remedies are inadequate. Petitioners rely on the Act's provision of a right to discharge and written notice of this right to discharge. Pet. Br. 24. However, in the case of a mentally ill individual who is incapable of providing voluntary informed consent, but is admitted on a voluntary basis, this remedy is grossly inadequate.<sup>38</sup> The research in this area

mental health professional in this case, the appropriate standard for immunity is not at issue.

<sup>37</sup> The Act currently provides an administrative procedure for the determination of the voluntariness of a minor's consent. § 394.465(1)(b), Pet. Br. A-25 to A-26. Although not necessarily required by due process, such a procedure could be used before the facility is obligated to institute involuntary commitment proceedings in cases in which a mental health professional determines that there is a question about the patient's ability to consent.

<sup>38</sup> Indeed, this Court has held that notice given to an incompetent person who does not have a guardian is not sufficient to satisfy due process demands. *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956).

strongly suggests that an individual who is not able to provide voluntary and informed consent to admission is unlikely to be able to comprehend the written notice of his right to discharge or to assert this right.<sup>39</sup> Moreover, even if the patient successfully exercises his right to discharge, he may be confined and medicated for at least eight days subsequent to his request for discharge.

Petitioners also rely on the right to sue for monetary damages in state court. Pet. Br. 25-28. The fundamental requirement of due process, however, is the opportunity to be heard at a "meaningful" time and in a "meaningful" manner. *Parratt v. Taylor*, *supra*, 451 U.S. at 540. For a patient who is incapable of understanding his right to discharge, Florida does not provide postdeprivation process at a meaningful time or in a meaningful manner. Such a "voluntary" patient may be held for months or even years before the facility sees fit to release him and without any formal review of his treatment or condition during his period of confinement. An action for monetary damages in these circumstances is no adequate substitute for better process at the time the patient is admitted.

#### D. Balancing the Factors

Balancing the interests of the individual and the State, the risk of erroneous deprivation, and the probable value of additional procedural safeguards, due process at least requires a formal threshold determination by a qualified mental health professional of a patient's ability to provide voluntary and informed consent prior to his voluntary

<sup>39</sup> Appelbaum, Mirkin & Bateman, *supra*, at 1173; Grossman & Summers, *A Study of the Capacity of Schizophrenic Patients to Give Informed Consent*, 31 *Hosp. & Comm. Psych.* 205, 206 (1980); Olin & Olin, *supra*, at 939-40. Moreover, the value of written notice provided to mental patients has been questioned by studies which found that the language of the forms used in mental hospitals is so difficult that the majority of mental patients lack the reading comprehension skills necessary to understand the forms. *E.g.*, Berg & Hammitt, *Assessing the Psychiatric Patient's Ability to Meet the Literacy Demands of Hospitalization*, 31 *Hosp. & Comm. Psych.* 266, 267 (1980).

admission to a mental hospital. This minimum requirement would not entail any significant additional burden on the State, while significantly reducing the likelihood of depriving mentally ill individuals of important procedural and liberty rights. Moreover, as this Court has stated, "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington v. Texas*, *supra*, 441 U.S. at 427.

Petitioners argue that this case "closely parallels" *Ingraham v. Wright*, 430 U.S. 651 (1977). Pet. Br. 18. That case established that postdeprivation state remedies may, in some circumstances, be all the process that is constitutionally required. This Court, however, has never held that there cannot be an action for a denial of due process when remedies exist under state law. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Unlike *Parratt* and *Hudson*, this is not a situation in which an individual is seeking to transform a common law tort into a constitutional violation. This Court has recognized the particularly significant deprivation of liberty inherent in an individual's involuntary commitment to a mental institution. *E.g.*, *Addington v. Texas*, *supra*, 441 U.S. at 425. Specifically, this Court did not hold in *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975), that the plaintiff was merely alleging a claim for false imprisonment; instead, it found a proper and well-founded action under § 1983. Similarly, this Court should permit Burch to attempt to prove his case.

The circumstances of this case are analogous not to *Ingraham*, but to *Parham v. J.R.*, 442 U.S. 584 (1979). In *Parham*, applying the *Mathews* balancing test to the Georgia statutory scheme on the basis of a "voluminous record," this Court held that due process requires that some kind of inquiry be made by a "neutral factfinder" to determine whether the statutory requirements for the admission of a child to a mental hospital are satisfied, even when the child's parents are requesting admission. *Id.*



606, 616. The Court found that there was sufficient risk in allowing a parent to institutionalize a child "voluntarily" that a determination of the child's need for treatment must be made by a mental health professional—there, a staff physician—prior to admission.<sup>40</sup> *Id.* 606-07.

The result *amici* seek follows from *Parham*. The risk of error is even greater here because the parents of a child are presumably much more likely to make a rational decision about the appropriateness of commitment than an adult like Burch suffering from a mental illness that makes him believe that he is "in heaven." In addition, this case involves an individual's capacity to waive the significant procedural rights available in involuntary placement proceedings, a circumstance that was not addressed in *Parham*. *Amici* ask that the Court go no further than it did in *Parham*.

#### CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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<sup>40</sup> Since the Georgia statute in *Parham* required that a staff physician make the determination at issue, and that requirement was held to be sufficient, the Court did not consider whether other mental health professionals could make the requisite threshold determination. 442 U.S. at 613-14. In this case, the Court also need not address which mental health professionals are required by due process to make the determination of a potential patient's capacity to provide voluntary and informed consent, because no such determination was made in this case.



**AMICUS CURIAE**

**BRIEF**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

MARLUS C. ZINERMON, M.D., *et al.*,

*Petitioners,*

—v.—

DARRELL BURCH,

*Respondent.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL  
LIBERTIES UNION AND THE ACLU OF FLORIDA  
IN SUPPORT OF RESPONDENT**

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MOTION FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE

The American Civil Liberties Union (ACLU) and the ACLU of Florida respectfully move for leave to file the annexed brief amicus curiae in this case. Respondent has consented to the filing of this amicus brief; petitioners have refused to give their consent.

The ACLU is a nationwide, non-partisan membership corporation dedicated to defending the principles of individual liberty embodied in the Constitution. Those principles are primarily designed to structure the relationship between the individual and the state. The ACLU has long been concerned with the ability of the state to affect the liberty of the individual through involuntary commitment procedures or other mental health rules that do not comply with due process requirements. The ACLU has also vigorously defended the



reach of 42 U.S.C. §1983 as a vehicle for defending individual rights against invasion and encroachment by persons wielding state power.

Because we believe that the decision below implicates important interests both in the mental health field and with respect to §1983, we respectfully request leave to file the annexed brief amicus curiae, in the hope that it will assist the Court's resolution of this case.

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities . . . . .	III
Interest of <u>Amici</u> . . . . .	1
Statement of the Case . . . . .	1
Summary of Argument . . . . .	1
I. <u>PARRATT v. TAYLOR</u> DOES NOT PROVIDE THE EXISTENCE OF AN ALTERNATE STATE REMEDY GENERALLY PRECLUDES A SECTION 1983 ACTION, AND ITS RATIONALE SHOULD NOT BE EXTENDED TO LIBERTY VIOLATIONS. . . . .	7
A. The Relationship between Constitutional and Common Law Torts. . . . .	7
B. The Rationale of <u>Parratt</u> . .	19
C. <u>Parratt</u> Should Not be Extended to Liberty Deprivations. . . . .	27

II. PETITIONERS WERE POSSESSED WITH THE AUTHORITY TO SUPPLY RESPONDENT BURCH WITH A MEANINGFUL PREDEPRIVATION HEARING, AND THEIR ABUSE OF THAT AUTHORITY AND THEIR FAILURE TO CONDUCT SUCH A HEARING PRECLUDES THE APPLICATION OF THE <u>PARRATT</u> RATIONALE. . . . .	33
III. PETITIONERS' ACTIONS WERE TAKEN PURSUANT TO ESTABLISHED STATE PROCEDURES. . . . .	40
IV. A SUBSTANTIVE DUE PROCESS VIOLATION WAS PROPERLY ALLEGED IN THE COMPLAINT AND IS NOT PRECLUDED BY <u>PARRATT</u> . . . . .	46
CONCLUSION . . . . .	50

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Addington v. Texas</u> , 441 U.S. 418 (1979). . . . .	32
<u>Augustine v. Doe</u> , 740 F.2d 322 (5th Cir. 1984) . .	47
<u>Bivens v. Six Unknown Named Agents</u> , 403 U.S. 388 (1971) . . . . .	10
<u>Bretz v. Kelman</u> , 773 F.2d 1026 (9th Cir. 1985). .	42
<u>Conway v. City of Mt. Kisco</u> , 758 F.2d 46 (2d Cir. 1985), cert. granted, 106 S.Ct. 878 (1986), writ dismissed sub nom. <u>Cerbone v. Conway</u> , as improvidently granted, 107 S.Ct. 390 (1986) . . . . .	27
<u>Cooper v. Aaron</u> , 358 U.S. 1 (1958) . . . . .	16
<u>Daniels v. Williams</u> , 474 U.S. 327 (1986) . . . . .	20, 48
<u>Estelle v. Gamble</u> , 429 U.S. 97 (1976) . . . . .	17
<u>Gilmere v. City of Atlanta</u> , 774 F.2d 1495 (11th Cir. 1985) .	47
<u>Graham v. Connor</u> , 109 S.Ct. 1865 (1989) . . . . .	8, 29



<u>Griffin v. Hilke,</u> 804 F.2d 1052 (8th Cir. 1986) . .	47
<u>Hall v. Tawney,</u> 621 F.2d 607 (4th Cir. 1980) . .	48
<u>Haygood v. Younger,</u> 769 F.2d 1350 (9th Cir. 1985) . .	32, 43
<u>Hudson v. Palmer,</u> 468 U.S. 517 (1984) . . . . .	3, 22, 23, 30
<u>Jackson v. Indiana,</u> 406 U.S. 715 (1972) . . . . .	32
<u>Logan v. Zimmerman Brush Co.</u> 455 U.S. 422 (1982) . . . . .	5, 38, 40, 41
<u>McCrorie v. Shimoda,</u> 795 F.2d 780 (9th Cir. 1986) . .	27
<u>Monroe v. Pape,</u> 365 U.S. 167 (1961) . . . . .	<u>passim</u>
<u>Morello v. James,</u> 810 F.2d 344 (2d Cir. 1987) . . .	47
<u>Mt. Healthy School Board District v. Doyle,</u> 429 U.S. 274 (1977) . . . .	18
<u>Owens v. Okure,</u> 109 S. Ct. 573 (1989) . . . . .	14
<u>Parratt v. Taylor,</u> 451 U.S. 527 (1981) . . . . .	<u>passim</u>

<u>Patterson v. Coughlin,</u> 761 F.2d 886 (2d Cir. 1985) . . .	43
<u>Paul v. Davis,</u> 424 U.S. 693 (1976) . . . . .	17
<u>Platt v. MacDougall,</u> 773 F.2d 1032 (9th Cir. 1985) . .	36
<u>Rutherford v. City of Berkeley,</u> 780 F.2d 1444 (9th Cir. 1986) . .	47
<u>Screws v. United States,</u> 325 U.S. 91 (1945) . . . . .	29, 37, 39
<u>Smith v. Wade,</u> 461 U.S. 30 (1983) . . . . .	8
<u>Sullivan v. LaMunyon,</u> 572 F. Supp. 753 (D. Kan. 1983) . . . . .	14
<u>Toney-el v. Franzen,</u> 777 F.2d 1285 (7th Cir. 1985) . .	28
<u>Village of Arlington Heights v. Metropolitan Housing Development Corporation,</u> 429 U.S. 252 (1977) . . . . .	18
<u>Watts v. Burkhart,</u> 854 F.2d 839 (6th Cir. 1988) . . .	44
<u>Whitley v. Albers,</u> 475 U.S. 312 (1986) . . . . .	17

<u>Wilson v. Beebe,</u> 770 F.2d 578 (6th Cir. 1985) . .	28, 44
<u>Wilson v. Civil Town of Clayton, Ind.</u> 839 F.2d 375 (7th Cir. 1988) . .	42
<u>Wilson v. Garcia,</u> 471 U.S. 261 (1985) . . . . .	14
<u>Wood v. Ostrander,</u> 851 F.2d 1212 (9th Cir. 1988). .	47
<u>Youngberg v. Romeo,</u> 457 U.S. 307 (1982). . . . .	48

#### Statutes

42 U.S.C. §1983. . . . .	<u>passim</u>
--------------------------	---------------

#### Other authorities

L. Friedman, "Parratt v. Taylor: Opening and Closing the Door on Section 1983," 9 Hastings Const.L.Q 545 (1982). . . . .	14
B. Neuborne, "The Myth of Parity," 90 Harv.L.Rev. 1105 (1977) . . . . .	15

#### INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, membership corporation dedicated to defending the principles of individual liberty embodied in the Constitution. Those principles are primarily designed to structure the relationship between the individual and the state. The ACLU has long been concerned with the ability of the state to affect the liberty of the individual through involuntary commitment procedures or other mental health rules that do not comply with due process requirements. The ACLU has also vigorously defended the reach of 42 U.S.C. §1983 as a vehicle for defending individual rights against invasion and encroachment by persons wielding state power. Because we believe that the decision below implicates important interests both in the mental health field and

with respect to Section 1983, we respectfully submit this brief amicus curiae.

#### STATEMENT OF THE CASE

Amici adopt the statement of facts as set forth in the Brief of Respondent.

#### SUMMARY OF ARGUMENT

##### I.

This Court's decision in Monroe v. Pape, 365 U.S. 167 (1961), established that even though unconstitutional acts by state officials might be the subject of a tort suit in state court, the existence of an alternate state remedy did not preclude the filing of a Section 1983 action. This was true since the federal remedy was supplemental to the state remedy. State actors exercising governmental power had the potential to inflict much

greater injury on a citizen, while the state tort remedies would not properly measure or compensate a victim of such abuse. The legislative history of Section 1983 made clear that Congress intended to grant a broader federal remedy against state actors under Section 1983, and it now has become the chief weapon for restraining and remedying unconstitutional acts of state officers.

That being so, this Court should hesitate to remit the victim of state lawlessness to only a state tort remedy.

Parratt v. Taylor, 451 U.S. 527 (1981), established only a limited exception to the rule that the existence of alternate remedies does not preclude a Section 1983 suit. Only when unanticipated negligent action by a state officer deprived a person of a property right, and the state provided postdeprivation procedures to compensate him, would a Section 1983 action be precluded. Hudson v. Palmer,



468 U.S. 517 (1984), extended the rule to intentional taking of property. In both cases the later state remedy fully compensates the victim. But when state officers invade a liberty interest of the citizens, far more is at stake, since liberty is not restorable or replaceable. Extending Parratt to liberty deprivations would insulate from the reach of Section 1983 the most outrageous actions of state officers -- the killing of an arrested person in his cell, the illegal imprisonment of a citizen without process, and the warehousing of a mental patient for an indefinite term.

## II.

Even if Parratt were held to apply to liberty deprivations, the other requirements of Parratt were not met here. The actions of the petitioners were not "random," that is,

unplanned, accidental and unanticipated. Petitioners were exercising the very powers that the state had given them, although they did so in a manner not authorized by the law. When state officers misuse the authority the state has given them, they are not acting in a random fashion, and Parratt has no application. This Court should not allow a state officer to escape responsibility for his unconstitutional actions by loudly, and proudly, proclaiming the "defense" that his actions were illegal under state law and therefore he is immune from a federal remedy.

## III.

Petitioners' actions were taken pursuant to established state procedures. This Court held in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), that when a person's constitutional rights are violated by state

officers who misapply the process entrusted to them, then the deprivation was the result of an "established state procedure," not subject to the Parratt rule. Thus the injury is considered to be the product of the combination of the established rule and its misapplication in a given case. It is not "random" in the sense required by Parratt, but is the result of an "established state procedure." That is especially true when the body that committed the constitutional injury was itself charged with the responsibility of supplying due process.

#### IV.

Parratt does not apply to substantive due process violations which were properly pled in this case.

## ARGUMENT

- I. PARRATT V. TAYLOR DOES NOT PROVIDE THAT THE EXISTENCE OF AN ALTERNATE STATE REMEDY GENERALLY PRECLUDES A SECTION 1983 ACTION, AND ITS RATIONALE SHOULD NOT BE EXTENDED TO LIBERTY VIOLATIONS.
- A. The Relationship between Constitutional and Common Law Torts.

We start with certain basic propositions about the relationship between Section 1983 and existing state tort law, which were established by this Court in Monroe v. Pape, 365 U.S. 167 (1961), and subsequent cases.

First, there are many actions by state or local officials that may constitute both a tort under local law and a violation of the Constitution under federal law. An officer may use excessive force on an individual, and as a result, may be sued for assault and battery under local law. Or he may be sued

under Section 1983 for violating the constitutional rights of the victim, namely his rights under the Fourth Amendment, see Graham v. Connor, 109 S.Ct. 1865 (1989). Similarly, an officer who invades a person's home without a warrant or other justification may be sued for trespass under local law, or under Section 1983 in federal or state court for violating the Fourth Amendment rights of the homeowner, see Monroe v. Pape, supra. A brutal and unjustified beating of a prisoner by, or as a result of the deliberate indifference of, a correction officer would be actionable as a battery under state law and an Eighth Amendment violation under federal law, see Smith v. Wade, 461 U.S. 30 (1983).

But at least since Monroe v. Pape, this Court has rejected any general requirement that a victim of abuse by a state officer must exhaust state remedies before invoking

Section 1983 or is relegated only to state remedies:

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

365 U.S. at 183 (emphasis added).

The rationale for this rule is fourfold:

1. The wrongs committed by a state officer who invades the home without a warrant or beats a citizen without justification are different in kind and degree from the wrongs committed by a private citizen who engages in a trespass or a battery. The private citizen is clearly an outlaw and may be resisted by reasonable force. An officer, by contrast, is armed with the authority of the state, may not lawfully be resisted, and thereby inflicts far greater injury on the victim. As this Court observed about federal officers in



Bivens v. Six Unknown Named Agents, 403 U.S. 388, 392 (1971): "An agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."<sup>1</sup>

2. It follows that the remedies awarded to persons deprived of a constitutional right must be different and greater than the remedies for a mere common law tort. Justice Harlan explained in a famous passage in Monroe:

There will be many cases in which the relief provided by the state

1. This view was also echoed by Justice Harlan's concurrence in Monroe. He accepted the view that the legislature that enacted Section 1983 thought that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." 365 U.S. at 196 (Harlan, J. concurring). See discussion below on the legislative history.

to the victim of a use of state power which the state did not or could not constitutionally authorize will be far less than what Congress may have thought would be a fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violation of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

365 U.S. at 196 n. 5 (Harlan, J. concurring).

3. The legislative history of Section 1983 examined in Monroe shows quite clearly that the Congress that enacted the provision in 1871 -- four years before general federal question jurisdiction was given to the federal courts -- knew that it was expanding

the jurisdiction of federal courts in keeping with their historic and primary purpose in Article III: to protect and enforce constitutional rights.<sup>2</sup> Furthermore, the legislature that passed §1983 knew that the new law would be applied against state actors, even though normal tort remedies may have been theoretically available against them in the state courts. There was absolutely no indication that Congress thought of Section 1983 as a "fall-back" provision, to be used only when the state courts did not do their duty to enforce common-law torts against state actors, or, as

2. In Madison's famous words, when he introduced the Bill of Rights into the First Congress: "If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislature or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Congress 489 (1789).

Justice Frankfurter wrote in his sole dissent in Monroe, to be used only when the unconstitutional state action was authorized by the state. Reviewing the legislative history in Monroe, Justice Harlan wrote:

This view [that a constitutional violation may be asserted in federal court even if it is also a state tort], by no means unrealistic as a common-sense matter, is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings. For example, the tone is surely one of overflowing protection of constitutional rights...[as] when Senator Frelinghuysen says:

"...the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights. As to the civil remedy no one, I think, can object."

365 U.S. at 196-97 (Harlan, J. concurring)

(footnote omitted).



4. As the Section 1983 remedy has developed since Monroe, it is now the chief litigation vehicle for protecting against abuse of power by state officers. As this Court has noted numerous times, it is a "unique remedy mak[ing] it appropriate to accord the statute "a sweep as broad as its language,"" Owens v. Okure, 109 S.Ct. 573, 581 (1989), quoting Wilson v. Garcia, 471 U.S. 261, 272 (1985). Section 1983 teaches

"state officers what the Constitution demands of them. It would defeat the purpose of the Congress that passed the law to relegate victims of official abuse to state courts. The Congress that passed what is now section 1983 demanded a mechanism by which state officers could be called to account if they violated the Constitution." ... Labeling a violation of a constitutional right as a simple tortious "injury to the rights of another" under state law denigrates the majesty of the Supreme Law of the Land, to which all state and federal laws, as well as all state and federal courts, are subservient.

Sullivan v. LaMunyon, 572 F. Supp. 753, 761-62 (D.Kan. 1983), quoting L. Friedman,

"Parratt v. Taylor: Opening and Closing the Door on Section 1983," 9 Hastings Const.L.Q. 544, 573 (1982).<sup>3</sup>

These propositions make clear that the availability of an alternate state remedy for the wrongs asserted in a Section 1983 suit is generally an irrelevancy. Congress did not care whether a state remedy for the same conduct existed when it enacted Section 1983. It established a federal forum for wrongs against the federal constitution because it felt that those "independent tribunals" were the most appropriate court to hear those claims, which are different in kind and degree from state torts and demand different

3. In addition, the institutional distance that federal judges enjoy from the political machinery of the state and their immunity from political and majoritarian pressures make federal courts a more appropriate forum for protecting against abuse of power by state officers through the Section 1983 remedy. See generally, B. Neuborne, "The Myth of Parity," 90 Harv.L.Rev. 1105, 1127-28 (1977).



remedies against state indifference or hostility toward constitutional rights.

Furthermore, this analysis shows that every time this Court declares for any reason that certain constitutional torts must be heard first, or must be heard only, in the state courts under the common law tort rules in force in that jurisdiction, it is not only cutting against the history and purpose of section 1983, but also against the rationale of federal court jurisdiction established in Article III and the primacy of federal court interpretation of the Constitution.<sup>4</sup>

On the other hand, and at the other extreme, it does not follow that every tort committed by a state officer or employee is, for that reason alone, a constitutional tort.

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4. As this Court said in Cooper v. Aaron, 358 U.S. 1, 18 (1958), "the federal judiciary is supreme in its exposition of the law of the Constitution."

This Court, in Parratt v. Taylor, 451 U.S. 527, 544 (1981), rejected the notion of converting "every alleged injury which may have been inflicted by a state official acting 'under color of law' into a violation of the Fourteenth Amendment cognizable under §1983."

Thus, state officers who commit certain defamatory torts do not violate the Constitution, see Paul v. Davis, 424 U.S. 693, 701 (1976). Prison officials who commit certain wrongs vis-a-vis their inmates do not violate the Constitution unless their actions reach certain defined levels of deliberate indifference, see Estelle v. Gamble, 429 U.S. 97 (1976), or are done with the purpose of imposing "unnecessary and wanton infliction of pain" on the inmates, see Whitley v. Albers, 475 U.S. 312 (1986). Other actions of state officers may not be constitutional violations unless done with the specific

intent to injure a person because of their race, see Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), or because of their exercise of First Amendment rights, see Mt. Healthy School Board District v. Doyle, 429 U.S. 274 (1977). In each of these areas, Section 1983 will not lie since a constitutional right has not been violated. The fact that a state tort remedy may or may not be available does not change the situation. The right claimed to have been violated is simply not one protected by the Constitution regardless of the availability of another remedy.

Between these two situations, this Court has defined an ambiguous middle ground, the limits of which are at issue on this appeal: under what circumstances does the existence of an alternate state remedy itself undercut

the assertion of the constitutional cause of action?

#### B. The Rationale of Parratt.

Parratt examined the problem first addressed in Monroe and took it in another direction. Monroe rejected the proposition that the availability of a state remedy precludes a constitutional cause of action regardless of whether the state action complained of was authorized by state law or not. In Parratt, the availability of a state remedy played a different role: assuming that the state provided certain procedures to remedy a wrong committed by a person acting under color of law, does that remedy satisfy the due process requirements of the Fourteenth Amendment?

Viewed from another perspective, the Fourteenth Amendment prohibits state actors

from depriving a person of life, liberty or property without due process of law. If the state supplies due process of law in another context to remedy the deprivation of life, liberty or property by a state actor, has it not undercut the assertion of any constitutional claim?

In the context of the situation presented in Parratt, this limitation on the scope of Section 1983 seemed particularly appealing. In the first place, there did not appear to be any serious abuse of power to be concerned about. A prisoner claimed that he lost a \$23.00 hobby kit as a result of the negligent action of a prison official. But, as this Court later held in Daniels v. Williams, 474 U.S. 327 (1986), negligence is not the kind of "abuse of power" that Section 1983 was meant to correct.

Second, the injury asserted in Parratt was a property loss, which the state could

fully compensate by the payment of damages exactly equal to the lost property. In that context, as this Court observed: "The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." 451 U.S. at 544.

Finally, the constitutional right that was allegedly violated in Parratt was "only" the right to a predeprivation hearing before the property was taken. This Court concluded, however, that there was no way that the state could have provided a predeprivation hearing on the facts presented. Specifically, since the loss in Parratt was the result of a single act of negligence, "It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." Id. at 541. Under these particular



circumstances, Parratt holds that the existence of a state tort remedy satisfies due process by giving the victim an adequate postdeprivation hearing and remedy.

This Court's decision in Hudson v. Palmer, 468 U.S. 517 (1984), added an additional feature to this analysis. In that case the injury was again to the property of an individual. But in Hudson the acts complained of were intentional rather than negligent. This Court held, nevertheless, that a Section 1983 suit will not lie. "The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations can occur." Id. at 533.

It is the failure to "anticipate" or "control" when these deprivations occur that

makes it impossible for the State to supply meaningful due process protections beforehand. If the state supplies such procedures later, through normal tort or administrative remedies that fully compensate the victim for his lost property, it has done all that it could reasonably expected to do as far as procedural due process is concerned. This is not the case, as Hudson makes clear, if the deprivations occurred through "established state procedure, rather than random unauthorized action," id. at 532. For in the latter situation, the state is obliged to supply process beforehand even after Parratt and Hudson (see discussion below in Point III).

The appealing simplicity of the approach outlined in Parratt and Hudson cannot hide the fact that this Court had accepted (in the context of a procedural due process violation) the argument originally rejected

by eight Justices in Monroe v. Pape. Justice Frankfurter had argued in sole dissent that Section 1983 "created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom or usage' sanctioned the grievance complained of." Monroe, 365 U.S. at 237 (Frankfurter, J., dissenting). In short, only if the unconstitutional act was authorized by state law or rule and therefore a state judicial remedy was unavailable, could a person obtain relief in federal court under Section 1983. Parratt and Hudson arrive at the same result, with respect to a procedural due process violation, through another route: namely that the State could not anticipate an unauthorized act of a state official that causes constitutional injury, and therefore it cannot be charged with failing to supply a

meaningful hearing before the deprivation occurs. If it supplies a hearing thereafter which fully compensates the victim, that is all that the Constitution requires.

The only difference between this approach and that of the Monroe dissent is that Justice Frankfurter would apply the same reasoning to all constitutional violations -- even of the substantive provisions of the First, Fourth and Eighth Amendments -- whereas Parratt and Hudson apply only to procedural due process claims.

The fact remains, however, that the Parratt approach threatens the entire basis for the Monroe majority decision. If unconstitutional actions by state officers are different in kind from assaults, trespasses or other torts by a private person, if a more effective remedy is desirable to correct these evils, if Congress intended to grant broad federal court

jurisdiction and protection against all official overreaching against the Constitution, and if Section 1983 is the key vehicle for protecting constitutional rights and for educating state officers and making them toe the constitutional line, then why eliminate the Section 1983 safeguard when procedural due process rights have been violated? To focus only on the ability of the state to anticipate and control the grant of a hearing before a constitutional deprivation is recognized and to ignore every other aspect of the violation of the Constitution by the state officer and the need for the federal remedy is to turn history and logic on its head.

At the very least, Amici respectfully suggest that limiting the alternate state remedy logic of Parratt to property losses limits the potential erosion of the Monroe rationale.

C. Parratt Should Not be Extended to Liberty Deprivations.

This Court has never extended the Parratt rationale to liberty deprivations. The court below simply assumed that the Parratt analysis would apply to the situation at hand, i.e., a loss of liberty for 152 days. The lower federal courts have split on this issue. The Ninth and Second Circuits have held that it should not be so extended: see McCrorie v. Shimoda, 795 F.2d 780, 786 (9th Cir. 1986) ("Property's susceptibility to being restored or replaced after a temporary deprivation supports a policy of allowing the state to try to remedy the loss before the deprivation becomes a constitutional violation. Liberty...is not restorable or replaceable; a liberty deprivation is permanent"); Conway v. City of Mt. Kisco, 758 F.2d 46 (2d Cir. 1985), cert. granted, 106 S. Ct. 878 (1986), writ dismissed sub nom.



Cerbone v. Conway as improvidently granted, 107 S.Ct. 390 (1986) (Parratt does not apply to liberty deprivations). The Sixth and Seventh Circuits have held that it should apply: Wilson v. Beebe, 770 F.2d 578, 585 (6th Cir. 1985) (en banc); Toney-el v. Franzen, 777 F.2d 1285 (7th Cir. 1985).

In deciding the question of extending Parratt to liberty deprivations, far more is at stake than merely focusing on the "impracticality" of the state supplying a hearing beforehand for a random and unauthorized act of a state official. This approach creates a smokescreen hiding what is really involved for the citizenry. A few examples will suffice to explain the problem.

Suppose a sheriff arrests a person for a minor traffic violation. While the person is safely confined in his cell, the sheriff deliberately and maliciously shoots and kills

him.<sup>5</sup> Will a Section 1983 remedy lie in federal court for such an outrageous act? If the arrest was made with probable cause and if excessive force is not used "in the context of the arrest or investigatory stop of a free citizen," there is some question whether the Fourth Amendment analysis of Graham v. Connor will apply, see 109 S. Ct. at 1871.

What constitutional right is involved? It would appear that the person arrested was deprived of his life without the procedural protections of the due process clause.<sup>6</sup> Whether the actions of the sheriff could be considered a substantive due process

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5. Compare the facts in Screws v. United States, 325 U.S. 91 (1945), where a young black was arrested by a sheriff for stealing a tire, was handcuffed and taken to the court house and then beaten to death by blackjacks wielded by the sheriff and two deputies.

6. If Parratt applies to liberty deprivations, there is certainly no basis for treating life deprivations any differently.

violation because of their outrageous nature is an open question (see discussion below in Point IV). But this is precisely the type of case which the petitioners say the Parratt reasoning must be applied to. Under their reasoning, a civil suit for damages in this situation must be brought in state court for wrongful death. The state could not "anticipate" or "control" the "random unauthorized act" of the sheriff in killing his prisoner: "the state cannot know when such deprivations will occur," Hudson, 468 U.S. at 533. Therefore, it could not supply process beforehand. On the other hand, "adequate state postdeprivation remedies are available" in the form of a state wrongful death action. Id. Therefore a federal remedy under Section 1983 will not lie, Q.E.D.

The Congress that passed Section 1983 in 1871 and the Court that decided Monroe would

marvel at such a result, since it was precisely this type of situation which led Congress to pass the law in the first place. This Court's focus on the verbal gymnastics of determining when a state could "anticipate" or "control" the actions of a state officer and whether it could supply a hearing before he violates the Constitution has taken it far astray from what Section 1983 was intended to accomplish.

The situation would be the same if the sheriff simply arrested a person on probable cause and kept him quietly in jail for 152 days without a hearing of any kind. The most obvious constitutional deprivation would again be a procedural due process claim for loss of liberty. Would such a claim be precluded under Parratt because the state could not anticipate the sheriff taking such action? If a jailer deliberately miscalculated an inmate's term of

imprisonment and kept him in a state penitentiary for 4-1/2 years longer than his maximum term, would such a suit be precluded under Parratt? (Compare with Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc) (no preclusion under Parratt for suit brought by prisoner kept in jail for extra 4-1/2 years). It is incredible to postulate that Section 1983 has no application to situations of this kind.

The result should be the same if a mental patient is "imprisoned" or deprived of his liberty for 152 days without process of any kind. This Court's decision in Addington v. Texas, 441 U.S. 418, 425 (1979), established that long-term mental hospitalization of a patient without proper procedures being followed was a deprivation of liberty without due process of law. Likewise in Jackson v. Indiana, 406 U.S. 715, 738 (1972), this Court held that an

incompetent pretrial detainee cannot be held indefinitely without either criminal process or civil commitment. A person's loss of liberty is no different if he is "imprisoned" by a sheriff or a psychiatrist. And the due process clause protects his interest in liberty in both situations.

II. PETITIONERS WERE POSSESSED WITH THE AUTHORITY TO SUPPLY RESPONDENT BURCH WITH A MEANINGFUL PREDEPRIVATION HEARING, AND THEIR ABUSE OF THAT AUTHORITY AND THEIR FAILURE TO CONDUCT SUCH A HEARING PRECLUDES THE APPLICATION OF THE PARRATT RATIONALE.

Even if Parratt were held to apply to a liberty deprivation, the other requirements of the Parratt rule do not apply here.

As noted above, Parratt applies only if the person who acts to deprive a person of his constitutional rights lacks all authority under state law to do so. Thus the warden had no authority to deprive Taylor of his



hobby kit and Hudson lacked all authority to take away Palmer's papers and possessions from his cell. When these state actors took the actions complained of, they acted in a "random and unauthorized" manner, i.e., contrary to any authority that they were given under state law to act in any way with respect to the property involved.

Furthermore, these individuals were not in a position to supply a "hearing" or any process before they took the actions complained of. They had no authority under state law to either take the actions with or without a hearing. And the state for whom they worked was not in a position to supply a due process hearing to the victims of their action since it could not foresee that these actors would act in such an irresponsible manner.

When persons is a position of authority abuse the very authority that the state has

given them, the situation is different. They are no longer acting in a "random," i.e., unplanned, accidental and unanticipated, manner. If the state requires that mental health officials hold a hearing before a patient is involuntarily committed and they fail to hold such a hearing, that is not an unplanned, accidental or unanticipated act.

The Court below explained:

We read Parratt and its progeny to define "random and unauthorized" conduct as conduct of a state officer who lacks the state-clothed authority to deprive persons of constitutionally protected interests. In contrast, the conduct complained of in the present case is not within the meaning of "random and unauthorized" as introduced by Parratt and refined by its progeny, but rather involves an abuse of state-clothed authority.

840 F.2d at 801 n.9 (emphasis in original).

The Ninth Circuit explained the problem in a similar manner:

Where the state has procedures, regulations or statutes designed to control the actions of state officials, and those officials

charged with carrying out state policy act under the apparent authority of those directives, it makes no sense to say either that their conduct was "random" or that it is impossible for the state to provide a hearing in advance of the deprivation. The considerations underlying Parratt are simply inapplicable to deliberate, considered, planned, or prescribed conduct by state officials, whether or not such conduct is authorized.

Piatt v. MacDougall, 773 F.2d 1032, 1036 (9th Cir. 1985).

In this case, petitioners are not accused of stealing a piece of property that Mr. Burch had with him -- such an act would be a true "random" act within the meaning of Parratt. Instead, they acted as agents of the state in committing him and invoked the powers that the state gave them in depriving him of his liberty. That they did so improperly and contrary to the requirements of state law does not make their acts "random" in the sense required by Parratt. This was "considered, planned, or prescribed

conduct by state officials" with respect to the commitment of mental patients. Having established a procedure of this kind and granted the authority to petitioners to exercise that power, the state was responsible when the petitioners did not perform in the required manner.

Any other conclusion leads to absurd results, as illustrated by the fact that petitioners loudly -- and proudly -- proclaim how "illegal" their actions were under state law. In what might be called the Screws-"the worse-things-are,-the-better-they-are" defense,<sup>7</sup> petitioners not only admit but

7. In Screws, the sheriff who killed the prisoner under his charge argued that his killing was not done "under color of law" within the meaning of 18 U.S.C. §242, since that phrase meant "pursuant to state law." But he argued that his actions were prohibited by state law and therefore he could not be held under the statute. This Court rejected that defense, stating that all that was necessary for the law to be invoked was that the wrongdoer was clothed with the authority of state law when he did the acts complained of. In Screws as here, state actors are saying that the worse we

assert as their chief defense that they violated state law: "While it is surely true that petitioners possessed the authority to hospitalize respondent, they had no authority under Florida law to do so without affording respondent a timely hearing." Petitioners' Brief at 64.

This Court should surely raise its collective eyebrows at a defense to a Section 1983 action that relies on the fact that the state actors insist on showing how "wrong" their actions were under state law, thereby depriving federal courts of their jurisdiction to punish them under that provision, which was designed with that very purpose in mind. This is simply a variation of the Screws defense, which seeks to make a distinction on whether an unconstitutional act is also a violation of state law. Such a

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characterize our actions under state law, the better off we are in defending ourselves against a federal law suit.

defense was held to be irrelevant in Screws, Classic and Monroe and should be rejected here as well.



III. PETITIONERS' ACTIONS WERE TAKEN  
PURSUANT TO ESTABLISHED STATE  
PROCEDURES.

Another way of examining this situation is to apply the Logan-"established state procedure" rationale, see Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), a point emphasized by Judge Clark's concurring opinion below. In that case, a state body was required to hold a hearing over an employment complaint within a specified period of time. Under Illinois law, the failure to act within the specified period deprived the body of jurisdiction over the complaint. The commission "inadvertent[ly]" failed to act within the statutory period, thereby cutting off Logan's "property" right to litigate his claim. This Court unanimously held that the failure of the commission to act was not a "random, unauthorized act" precluding any further

action by the plaintiff -- although it was done contrary to state law. The entire process under which the claim was forfeited -- which included both the 120-day requirement and the failure of the commission to act within that period -- constituted an "established state procedure" which was not subject to the Parratt rule.

What the Logan rule suggests is the following: an "established state procedure" is one that encompasses both the state rule and regulation that requires certain procedures to be followed and the actual practice by the person or body that enforces that rule and regulation. If together the rule and that actual practice under the rule deprives a person of his due process requirements, then it is not a "random, unauthorized act." It was "authorized" by the state, i.e., mandated by the law and the failure by those charged with enforcing and

applying it to follow the proper procedures. In that sense, the loss was the result of the application of the "established" state law on the subject.

Thus, if the liberty (or property) deprivation is made by the state actor who is in a position to supply due process but does not do so, then Parratt has no application. For example, in Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985), the plaintiff alleged that he was held without bail by the defendant law enforcement officers through the bringing of false criminal charges against him in an unrelated case. The very officials who he claimed violated his rights were in a position to release him on bail. The Ninth Circuit held that Parratt did not apply.

The Parratt analysis, in which the touchstone for predeprivation analysis is the feasibility of providing such process, is simply inapplicable where the alleged deprivation is inextricable from

the alleged corruption of the process which the state ordinarily could provide.

773 F.2d at 1031.<sup>8</sup>

Similarly, in Patterson v. Coughlin, 761 F.2d 886, 892 (2d Cir. 1985), a prisoner alleged that he had been placed in isolation without a hearing mandated by state law. The warden argued that his claim was precluded by Parratt. The court rejected that claim. It found that "the responsible state officials who had the power to grant appellant a hearing" refused to do so. In that case, "it was not impossible or impracticable to

8. See also Haygood v. Younger, 769 F.2d at 1357 (9th Cir. 1985) (en banc): "...where the injury is the product of the operation of state law, regulation, or institutionalized practice, it is neither random nor unauthorized, but wholly predictable, authorized and within the power of the state to control. In such cases, the state may not take away the protected interest without a hearing in advance of the injury....The Supreme Court noted that Logan was not challenging the commission's error, but was challenging the established state procedure itself which destroyed his rights without giving him an opportunity to be heard."

provide such remedies." Thus the deprivation was not "random and unauthorized," and Parratt did not apply.

The Seventh Circuit saw the issue in terms of the level at which the unconstitutional act was taken. Thus in Wilson v. Civil Town Of Clayton, Ind., 839 F.2d 375, 380 (7th Cir. 1988), the court noted that if the "person committing the unconstitutional act [is] employed at such a low level of state or local government...the official authorized to grant a predeprivation hearing would be unaware of the person's actions." But if the person committing the act is authorized and required to grant the hearing but does not do so, then the entire process must be chargeable to the state.<sup>9</sup>

9. See also Watts v. Burkhart, 854 F.2d 839, 843 (6th Cir. 1988) (failure of state administrative board to follow mandated procedures in revoking doctor's license to practice medicine not random unauthorized act insulated by Parratt, since board had the authority to follow the proper procedures).

That is precisely what is involved in the instant case, as the petitioners readily admit. They "possessed the authority" to hospitalize respondent, but lacked the authority to do so without a hearing. The combination of the law, with the responsibility placed on petitioners to follow certain procedures which they failed to perform, constitutes an "established state procedure" within the meaning of Logan. It was the entire procedure that failed in this case, and the final act of petitioners in not granting the hearing cannot be separated from the law and regulations to which it was tied. In this case, it was truly the state that inflicted the constitutional injury complained of.



IV. A SUBSTANTIVE DUE PROCESS VIOLATION WAS PROPERLY ALLEGED IN THE COMPLAINT AND IS NOT PRECLUDED BY PARRATT.

Five members of the court below found that a substantive due process violation was properly alleged in this case, since the complaint alleged an unjustifiable deprivation of liberty for 152 days. 840 F.2d at 803 (concurring opinion of Judge Johnson). That conclusion is entirely correct and would require the affirmance of the decision below in any event.

Every appellate court that has considered the matter -- and members of this Court as well<sup>10</sup> -- have apparently agreed that the Parratt rationale does not apply to

10. See concurring opinion of Justice Stevens in Daniels, 474 U.S. at 336-40; Justice Blackmun in Parratt, 451 U.S. at 545.

substantive violations of the Constitution, i.e., violations of the substantive provisions of the First, Fourth and Eighth Amendments. See e.g., Wood v. Ostrander, 851 F.2d 1212, 1215 (9th Cir. 1988); see also Morello v. James, 810 F.2d 344 (2d Cir. 1987) (Parratt does not apply to violation of First Amendment rights); Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984) (Parratt does not apply to Fourth Amendment violation).

Most lower federal courts have also agreed that Parratt does not apply to substantive due process violations, i.e., shocking, outrageous, unjustified actions by state officials that do not otherwise fit within any of the substantive provisions of the Bill of Rights.<sup>11</sup> As Justice Stevens

11. See e.g., Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985(en banc) (use of deadly force on arrested person was substantive due process violation); Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986) (unprovoked assault on pretrial detainee is substantive due process violation); Griffin v. Hilke, 804 F.2d 1052

explained in his concurring opinion in Daniels, 474 U.S. at 337, the Due Process Clause of the Fourteenth Amendment "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them,'" citing the majority decision in Daniels, *id.* at 331.

Furthermore, this Court has held that the deprivation of liberty of a mental patient may be a substantive due process violation. In Youngberg v. Romeo, 457 U.S. 307, 321 (1982), this Court noted:

In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and "the demands of an organized society." .... In seeking this balance in other cases,

(8th Cir. 1986) (excessive force on unarmed fleeing felon is substantive due process violation); Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (substantive due process violation for severe and unjustified beating on student).

the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

"By holding Burch for such an unreasonable period of time without process of any kind and contrary to every state rule on the subject, petitioners crossed the line and committed a totally unjustified act. As Judge Johnson said below it is a "species of conduct that is unjustified because it is, in and of itself, antithetical to fundamental notions of due process." 840 F.2d at 804 (Johnson, J., concurring) As such it constitutes a substantive due process violation that is not barred by Parratt.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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Respectfully submitted,

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